EDITOR'S NOTE

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o. 85-767-CFX
tatus: GRANTED

Title: North Carolina Department of Transportation, et al., Petitioners
v.
Crest Street Community Council, Inc., et al.

ocketed:
ovember 15, 1985

Court: United States Court of Appeals for the Fourth Circuit

Counsel for petitioner: Richmond, James B., Thornburg, Lacy H.

Counsel for respondent: Calhoun, Michael D.

ntry	Date	Note	Proceedings and Orders
1	Nov 13 1985	G	Petition for writ of certiorari filed.
2	Dec 18 1985		DISTRIBUTED. January 10, 1986
3	Dec 20 1985		Brief of respondents Crest Street Community, et al. in opposition filed.
4	Jan 13 1986		Petition GRANTED.
			**********
6	Feb 18 1986		Order extending time to file brief of petitioner on the merits until March 27, 1986.
7	Mar 18 1986		Order further extending time to file brief of petitioner on the merits until April 4, 1986.
8	Apr 2 1986		Appendix of United States filed.
9	Apr 2 1986		Brief of petitioners NC Dept. of Trans., et al. filed.
10	Apr 4 1986		Brief amicus curiae of United States filed.
11	Apr 10 1986		Record filed.
12	Apr 10 1986		Certified copy of original record and proceedings, IV volumes, received.
13	Apr 16 1986	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
15	Apr 23 1986		Order extending time to file brief of respondent on the merits until June 3, 1986.
16	Apr 28 1986		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
17	Jun 3 1986		Brief of respondents Crest Street Community Council, Inc., et al. filed.
18	Jul 15 1986		CIRCULATED.
19	Jul 28 1986		SET FOR ARGUMENT. Tuesday, October 7, 1986. (3rd case). (1 hour).
20	Sep 30 1986	X	Reply brief of petitioners NC Dept. of Transportation, et al. filed.
21	Oct 7 1986		ARGUED.

85-767

No. .....

Supreme Court, U.S.
FILED
NOV 13 1985
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, NORTH CAROLINA BOARD OF TRANSPORTATION, and JAMES E. HARRINGTON, as Secretary of the North Carolina Department of Transportation and Chairman of the North Carolina Board of Transportation,

Petitioners,

v.

CREST STREET COMMUNITY COUNCIL, INC., RESIDENTS OF CREST STREET COMMUNITY, and SAVE OUR CHURCH and COMMUNITY COMMITTEE,

Respondents.

ON WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED*

I. Are attorney's fees recoverable under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. Section 1988, by prevailing parties for representation in a federal administrative proceeding under Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000d, which fees are not for time expended on a judicial proceeding in court?

II. Does the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. Section 1988, give prevailing parties in an administrative proceeding under Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000d, a right to bring an independent civil action to recover attorney fees?

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*Rule 28.1 is not applicable in this case.

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PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

The North Carolina Department of Transportation, North Carolina Board of Transportation, and James E. Harrington, as Secretary of the North Carolina Department of Transportation and Chairman of the North Carolina Board of Transportation, Petitioners herein, pray that a writ of certiorari issue to review the judgment of the Fourth Circuit Court of Appeals entered August 15, 1985 entitled Crest Street Community Council, Inc., Residents of Crest Street Community, and Save Our Church Committee, Appellants, v. North Carolina Department of Transportation, North Carolina Board of Transportation, and James E. Harrington, as Secretary of the North Carolina Department of Transportation and Chairman of the North Carolina Board of Transportation, Appellees, No. 85-1008.

—o—

REPORTS OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, of which review is sought, is published but has not yet been reported. A copy thereof is printed in the Appendix attached hereto, *infra,* page App. 1. The opinion of the United States District Court for the Middle District of North Carolina, which was reversed by the Fourth Circuit Court of Appeals, is published and reported in 598 F. Supp. 258 (1984). A copy thereof is printed in the Appendix attached hereto, *infra,* page App. 22.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit, of which review is sought by this petition, was entered on August 15, 1985. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254.

———o———

STATUTE INVOLVED

The statute involved is The Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, which provides in relevant part:

> "In any action or proceeding to enforce the provisions of Sections 1981, 1982, 1983, 1985 and 1986 of this title, Title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964, the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

———o———

STATEMENT OF THE CASE

Respondents, civic organizations representing the interests of the Crest Street community, a stable, cohesive black neighborhood in western Durham, North Carolina, commenced this civil action on November 30, 1983, in the United States District Court for the Middle District of North Carolina, Durham Division, to recover attorneys' fees and other expenses, under The Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, for representation (i) in an "administrative proceedings" to enforce

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1, as provided by 49 C.F.R. PART 21, and (ii) in a motion to intervene in *ECOS, et al v. Brinegar, et al,* No. C-352-D-72(MDNC), and leave to file a complaint therein to enforce Title VI and other statutes. In September, 1978, Respondents filed an administrative complaint with the Secretary of the United States Department of Transportation (USDOT), alleging that the North Carolina Department of Transportation (NCDOT) in its planning for the construction of the East-West Expressway through the Crest Street community was in violation of Title VI and 49 C.F.R. § 21.7(d), and other statutes governing eligibility for federal-aid to State highway construction. The Secretary treated the complaint as one made under 49 C.F.R. § 21.11(b) and conducted an investigation under 49 C.F.R. § 21.11(c). As a result of the investigation, the USDOT Office of Civil Rights informed the Secretary of NCDOT of its preliminary conclusion and judgment that the alignment of the highway and interchange in the Crest Street community as proposed in the Draft Environmental Impact Statement "would constitute a prima facie violation of Title VI, and, in particular Section 21.5(b)(3)" of 49 C.F.R. Thereafter Respondents, representatives of NCDOT and the City of Durham, and others entered into discussions and negotiations and resolved the dispute by informal means as provided by 49 C.F.R. 21.11(d)(1). No procedure for effecting compliance under 49 C.F.R. § 21.13 was initiated. Agreement in principle to resolve the dispute by compressing the highway and its interchange, and relocating the community as a whole to an adjacent site by the use of a combination of State, federal and local programs was reached and incorporated into the Final Environmental Impact Statement.

On February 20, 1973, further construction of the East-West Expressway was enjoined in the *ECOS* case pending compliance with public hearing requirements of 23 U.S.C. § 128 and preparation and filing of a Final Environmental Impact/Section 4f Statement in compliance with 42 U.S.C. § 4332(1)(C) and 49 U.S.C. § 1653(f). Following preparation and filing of the Final Environmental Impact Statement, NCDOT moved in the *ECOS* case for dissolution of the injunction. Thereafter, Respondents Crest Street Community Council, Inc., and an individual moved to intervene as parties plaintiffs, and to file a complaint alleging violation of Title VI and other laws. Two months later, the *ECOS* action was concluded by consent judgment dissolving the injunction and dismissing the action. Respondent Crest Street Community Council, Inc., and the individual were not allowed to intervene. The next day after the consent judgment was entered, The Crest Street Community Council, Inc., NCDOT and the City of Durham formally executed agreements embodying in detail the agreements reached earlier in principle.

During the discussions and negotiations leading up to resolution of the dispute, the Respondents and NCDOT put aside the issue of liability for attorney fees under 42 U.S.C. § 1988. The formal agreements and the consent judgment reserved any rights Respondents may have to recover attorney fees under the statute.

On cross motions for summary judgment, the district court dismissed Respondents' action. The United States Court of Appeals for the Fourth Circuit reversed the judgment of the district court and remanded for determination of a reasonable fee.

ARGUMENT

A prevailing litigant is not entitled to recover attorney fees from his adversary except as authorized by statute. *Aleyeska Pipeline Service Company v. The Wilderness Society,* 421 U.S. 240 (1975). The decisions of the federal courts of appeal are in conflict as to whether attorney fees are recoverable under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. Section 1988, for time spent in federal administrative proceedings under Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000d. The decision of the Court of Appeals for the Fourth Circuit in this case adds to the conflict.

Under the rationale of *Blow v. Lascaris,* 668 F.2d 670 (2nd Cir. 1982) cert. denied, 459 U.S. 914 (1982); *Latino Project, Inc. v. City of Camden,* 701 F.2d 262 (3rd Cir. 1983); *Redd v. Lambert,* 674 F.2d 1032 (5th Cir. 1982); *Webb v. County Board of Education,* 715 F.2d. 254 (6th Cir. 1983) affirmed 471 U.S. —, 85 L.Ed.2d. 233, 105 S.Ct. 1923 (1985); *Horacek v. Thone,* 710 F.2d 496 (8th Cir. 1983); *Garcia v. Ingram,* 729 F.2d. 691 (10th Cir. 1984); Section 1988 does not authorize the recovery of attorney fees in this case.

Although the term "action or proceeding" is ambiguous and the word "proceeding" is broad enough to include an administrative proceeding, the opinions in *Blow v. Lascaris, supra,* at 671, *Latino Project, Inc. v. City of Camden, supra,* at 264 and *Horacek v. Thone, supra,* at 500, construe the words of the statute to mean a proceeding or action in a court, and not an administrative proceeding, was intended.

The opinions in *Blow v. Lascaris, supra,* at 671; *Latino Project, Inc. v. City of Camden, supra,* at 264, *Horacek*

v. Thone, supra, at 449 and 450; and *Webb v. Board of Education, supra,* at 258 and 259, construe the legislative history to mean a proceeding or action in a court, and not an administrative proceeding, was intended. The legislative history does not discuss administrative proceedings but rather speaks in terms of "court", "in suits", "in court", "through the courts", "in these cases", and "court action".

The opinions in *Redd v. Lambert, supra,* at 1036, *Horacek v. Thone, supra,* at 499, *Latino Project, Inc. v. City of Camden, supra,* at 264 and 265, and *Webb v. Board of Education, supra,* at 256, decline to follow the decision under Title VII of the Civil Rights Act of 1964, and 42 U.S.C. Section 2000e-5(k) in *New York Gaslight Club, Inc. v. Carey,* 447 U.S. 54 (1980) and have distinguished *Carey* on the grounds that the enforcement scheme of Title VII includes mandatory prior state administrative and court proceedings while the enforcement schemes of the statutes listed in Section 1988 do not. Furthermore, there is no congressional policy requiring exhaustion of administrative remedies under the statutes listed in Section 1988 as there is in Title VII. *Webb v. Board of Education, supra,* at 257. The reasons for construing that Congress intended "proceedings" to include administrative proceedings in *Carey* do not exist under Title VI and Section 1988.

In the opinion in this case, the Court of Appeals for the Fourth Circuit construed the statutory language of Section 1988 to mean that Congress intended to award fees for both civil actions and administrative proceedings under Title VI. Appendix, *infra,* page App. 9. It interpreted the legislative history as being consistent with an interpretation that Congress intended to award fees for administrative proceedings as well as civil actions under Title VI, Appendix, *infra,* page App. 13. Finally, it interpreted *Carey* to support the award of fees for administrative proceedings under Title VI. The opinion recognizes that it may be in conflict with *Latino Propect, Inc. v. City of Camden, Inc., supra,* doubts its correctness, and attempts to distinguish it on the basis that no civil action to enforce Title VI was filed whereas in this case Respondents executed a consent judgment albeit as "Applicants for Intervention", Appendix, *infra,* page App. 14. On the other hand, the opinion asserts Title VI may only be enforceable by administrative proceeding. Appendix, *infra,* page App. 13.

The rationale of the opinions in *Ciechon v. City of Chicago,* 686 F.2d 511 (7th Cir. 1982), *Lampher v. Zagel,* — F.2d — (7th Cir. 1985) and *N.A.A.C.P. v. Wilmington Medical Center, Inc.,* 689 F.2d. 1161 (3d Cir. 1982) is consistent with the opinion of the Court of Appeals for the Fourth Circuit in this case.

The petition for writ of certiorari in this case should be granted to resolve the conflicts in the circuit courts of appeal.

The opinion of the Court of Appeals in this case appears to be in conflict with the rationale of the decision of the Supreme Court in *Webb v. Board of Education of Dyer County,* 471 U.S. —, 105 S.Ct. 1923, 85 L.Ed.2d 233 (1985). Certiorari was granted in *Webb* to resolve an apparent conflict in federal authority on the availability of attorney fees under Section 1988 for time spent in state administrative proceedings prior to the filing of a federal civil rights action, citing in footnote 11 the same conflict-

ing decisions noted above, including *Latino Project* which involved a federal administrative proceeding under Title VI. The same rationale for recovery of attorney fees under Section 1988 for time spent in state administrative proceedings should apply to federal administrative proceedings under the statutes listed in Section 1988.

Although *Webb* does not construe the language of Section 1988 to mean administrative proceedings were not intended, it does appear to construe the legislative history as intending court actions rather than administrative proceedings and distinguishes *Carey* on the same reasoning used in *Redd v. Lambert, supra,* at 1036, *Horacek v. Thone, supra,* at 264 and 265, and *Webb v. Board of Education, supra,* at 256.

For this apparent conflict with the decision in *Webb,* and to resolve the important issue presented by this question, the petition should be granted.

Section 1988 does not create an independent cause of action to recover attorney fees. *Horacek v. Thone, supra,* 499; *Estes v. Tuscaloosa County,* 696 F.2d. 898, 901 (11th Cir. 1983).

CONCLUSION

For the foregoing reasons in accordance with Rule 17 of the Rules of the Supreme Court, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1008

Crest Street Community Council, Inc.;
Residents of Crest Street Community;
Save Our Church & Community Committee,

Appellants,

versus

North Carolina Department of Transportation;
North Carolina Board of Transportation;
James E. Harrington, Secretary of the North Carolina Department of Transportation and Chairman of the North Carolina Board of Transportation,

Appellees.

Appeal from the United States District Court for the Middle District of North Carolina, at Durham. Hiram H. Ward, Chief District Judge. (CA 83-1239-D)

Argued: June 7, 1985 Decided: August 15, 1985

Before WINTER, Chief Judge, and WIDENER and CHAPMAN, Circuit Judges.

Michael D. Calhoun (North Central Legal Assistance Program on brief) for Appellants; James B. Richmond, Special Deputy Attorney General (Lacy H. Thornburg, Attorney General on brief) for Appellees.

WINTER, Chief Judge:

The prevailing parties in a federal administrative action involving Title VI of the Civil Rights Act of 1964

sought to recover attorney's fees under 42 U.S.C. § 1988 in an independent action in federal district court. The district court denied their request. We reverse.

I.

Plaintiffs represent residents of Crest Street community, a well-established, predominantly black neighborhood in Durham, North Carolina.[1] Prior to late 1976, the City of Durham had requested, and defendant North Carolina Department of Transportation (NCDOT) had planned, extension of the East-West Freeway through the Crest Street community. The proposed extension was a federal-aid highway project, with approximately 75% of its costs to be paid by federal funds. The proposed highway extension would have destroyed much of the community, including its church and park, and would have splintered the remainder into isolated sectors likely to undergo commercial development. The lengthy planning period for construction of the freeway discouraged public and private development and maintenance in the Crest Street community for many years.

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1. Plaintiffs Residents of Crest Street Community and Save Our Church and Community Committee are unincorporated associations whose members are residents of the Crest Street area and members of the New Bethel Baptist Church. The former was organized in 1976 for civic improvement purposes, and the latter was formed in 1977 as a subcommittee or agent of the former for the purpose of opposing the freeway extension. Plaintiff Crest Street Community Council, Inc. was incorporated in February of 1980 to assume the functions of the other two plaintiffs, including conducting the negotiations surrounding the previously-filed administrative complaint. For our purposes the three groups may be treated as one, and most further references will be simply to "plaintiffs."

NCDOT's plans for the extension remained dormant for several years, but active planning resumed in 1976. In March 1977, plaintiffs retained the North Central Legal Assistance Program as counsel to represent them concerning the defendants' planning and constructing of the freeway and remedial efforts to mitigate the adverse impact of the project. During 1977 and 1978, the residents and organizations of the Crest Street community expressed their opposition to construction of the freeway through the Crest Street community, but defendants proceeded with issuing a revised draft Environmental Impact Statement for the project.

Plaintiffs responded to defendants' new plans and revised Environmental Impact Statement by filing an administrative complaint in September 1978 with the United States Department of Transportation (DOT), as authorized by 49 C.F.R. § 21.11(b) (1977). Plaintiffs sought an investigation of whether NCDOT's practices complied with Title VI of the Civil Rights Act of 1964 and other federal laws.[2] The administrative complaint sought prohibition of further planning or construction of the freeway and rejection of NCDOT's Environmental Impact Statement until the freeway project was brought into compliance with applicable laws.

As required by its regulations, 49 C.F.R. § 21.11(c), DOT investigated the freeway proposals and the allega-

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2. The administrative complaint challenged defendants' proposal under provisions of the National Environmental Policy Act, 42 U.S.C. § 4331, the Federal-Aid Highway Act, 23 U.S.C. § 109, Title VIII of the Civil Rights Act of 1968 (fair housing), 42 U.S.C. § 3601, and various implementing regulations, as well as under Title VI.

tions of the administrative complaint. On February 20, 1980, after the field investigation, the DOT Director of the Office of Civil Rights informed NCDOT of DOT's preliminary finding of reasonable cause to believe that construction according to the NCDOT proposal would constitute a prima facie violation of Title VI and of DOT's implementing regulations, particularly 49 C.F.R. § 21.5 (b)(3).[3] The parties then took the next step in DOT's Title VI compliance process and began extensive negotiations to resolve their differences through "voluntary means."[4] Representatives from DOT, the Federal Highway Administration, and the City of Durham, as well as defendants, plaintiffs, and other opponents of the freeway, participated in these negotiations. In February 1982,

3. That section provides:

> In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding persons from, deny them the benefits of, or subjecting them to discrimination under any program to which this regulation applies, on the grounds of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this part.

4. Title VI directs that "no such action [cutting off funding] shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means." 42 U.S.C. § 2000d-1. DOT's regulations similarly provide that "[i]f an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the Secretary will so inform the recipient and the matter will be resolved by informal means whenever possible." 49 C.F.R. § 21.11(d)(1) (1984). Formal agency action is to be avoided unless the "threatened noncompliance cannot be corrected by informal means." 49 C.F.R. § 21.13(a) (1984).

plaintiffs, the City of Durham, and NCDOT reached a preliminary agreement for the freeway design, relocation assistance benefits, and other assistance in mitigation of the adverse impact of the project, but negotiations continued on a final assistance plan and ultimate resolution of all issues raised by the administrative complaint.

In August 1982, NCDOT moved to dissolve a 1973 order which had been entered in ECOS, Inc. v. Brinegar, No. C-352-D-72 (M.D.N.C.), enjoining construction of the freeway.[5] Plaintiffs and Willie Patterson, a resident of the Crest Street community, filed a proposed complaint and moved to intervene in the *ECOS* action on October 15, 1982. Their obvious purpose was to contest dissolution of the injunction until their interests were fully protected. While this motion for intervention was pending, the parties concluded their negotiations and prepared the Final Mitigation Plan, and the City of Durham and NCDOT prepared a complementary Municipal Agreement that accompanied the Final Mitigation Plan. The district court never formally ruled on the motion to intervene, but the applicants

5. Plaintiffs in the *ECOS* action were ECOS, Inc. (a nonprofit, educational, ecological corporation), an association of Duke University students and some of its members, and two Durham residents. The defendants were state and federal transportation officials and a construction company. The action had alleged violations of the public hearing requirement and the preservation of parking requirements of the Federal-Aid Highway Act, 24 U.S.C. §§ 128, 138, the parkland preservation policy of the Department of Transportation Act of 1966, 49 U.S.C. § 1653(f), and the National Environmental Policy Act of 1969, 42 U.S.C. § 4332. The order enjoined steps toward construction of a section of the proposed freeway including that through the Crest Street area until the defendants achieved full compliance with the statutes allegedly violated.

for intervention were parties to a December 14, 1982 Consent Judgment dissolving the injunction and dismissing the *ECOS* action.[6] On the following day, Plaintiffs, NCDOT, and the City of Durham executed the Final Mitigation Plan in a public ceremony.

The Final Mitigation Plan recites that the Crest Street Community Council, Inc. "agreed to withdraw its administrative complaint if the City and NCDOT agreed to implement these mitigation efforts," and that plaintiffs agreed to support dissolution of the injunction in the *ECOS* case. In return for allowing construction of the freeway extension to proceed, plaintiffs were accorded substantial relief under the terms of the Plan. The Plan sets out in a comprehensive fashion steps that the City and NCDOT agreed to take to mitigate the detrimental impact of the freeway on the Crest Street community. The defendants moved the proposed highway right-of-way and modified an interchange so as to preserve the community church and park. Plaintiffs state that defendants esti-

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6. The Consent Judgment provided, *inter alia*, that the state highway defendants and applicants for intervention had

> resolved the things and matters in controversy between them by agreement adopted by the North Carolina Board of Transportation on November 19, 1982. The plaintiffs and applicants for intervention do not or no longer oppose the State defendants' motion to dissolve the injunction and do not wish to prosecute this action any further except that the applicants for intervention explicitly reserve the right to pursue all claims in their application for intervention and in addition reserve their claim for attorney fees against the State defendants and the North Carolina Department of Transportation and the plaintiffs reserve their right to pursue all claims relating to the section of expressway proposed to be constructed between U.S. Highway 15-501 and Interstate 85.

mated the cost of implementing their major direct responsibilities under the Plan to be $3,072,000, and as part of the settlement NCDOT released the City of Durham from its obligation to pay an estimated $2,750,000 towards right-of-way costs for the freeway. A new community site will be developed in the same area and will allow the residents to remain intact as a community, and the quality of the housing, streets, and recreational facilities in the new community will be much better than conditions in the existing community.

The Plan recited that the City and NCDOT denied any liability for plaintiffs' attorney's fees, and that plaintiffs preserved their right to claim such fees. In August 1983, plaintiffs' counsel sent defendants a detailed request for attorney's fees. NCDOT adhered to its position that it was not liable for such fees, and plaintiffs filed this action on November 30, 1983. The parties filed cross-motions for summary judgment, and on November 29, 1984, the district court granted defendants' motion and dismissed the action. 598 F. Supp. 258 (M.D.N.C. 1984).

The district court first separated the hours that plaintiffs' counsel worked into those connected with the administrative and the *ECOS* proceedings. It concluded that the 1,224.25 hours worked before the motion to intervene could not be attributed to the *ECOS* action because "to retroactively declare that efforts done over a five year period would have been required in the course of litigation later initiated would result in a highly speculative, uncertain, and unfairly surprising award of fees." *Id* at 263. The district court then held that § 1988 does not authorize an award of attorney's fees for administrative proceedings to enforce Title VI, and that plaintiffs could not recover

any fees incident to the *ECOS* litigation because they were not prevailing Title VI parties in that action. *Id* at 263-67. Plaintiffs appealed.

II.

The Civil Rights Attorney's Fees Awards Act of 1976 added the following sentence to 42 U.S.C. § 1988, which previously had no provision for such fees:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

We think that the wording of § 1988 explicitly covers plaintiffs' claim: They were "prevailing parties" in a "proceeding to enforce . . . title VI of the Civil Rights Act of 1964."

If we approach the statutory language in reverse order, the threshold requirement for this and other similar statutes is that the attorney's fees claimant be a "prevailing party, other than the United States." Defendants concede that plaintiffs gained substantial relief that was causally related to their administrative complaint and that plaintiffs therefore are "prevailing parties."[7]

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7. Although the precise amount and reasonableness of plaintiffs' requested fees will be subject to negotiations between the parties and if necessary to the district court's discretion, we see no reason categorically to exclude the time spent in preparng the motion to intervene or otherwise spent in the *ECOS* proceedings. *Cf.* Chrapliwy v. Uniroyal, 670 F.2d 760, 765-67 (7 Cir. 1982)

(Continued on following page)

The next statutory requirement is that the underlying legal complaint have been brought in an "action or proceeding to enforce a provision of" one of the listed laws. Defendants argue that plaintiffs' administrative complaint was not an "action or proceeding" within the meaning of § 1988. The natural or usual meaning of the words "action or proceeding" connotes "civil" action and "administrative" proceeding. Of course, "proceeding" alone may be read broadly enough to include "civil" action. We see no reason to depart from those meanings here. Some of the substantive provisions listed in § 1988 explicitly contemplate civil actions in state or federal court, and some, such as Title VI, explicitly contemplate initial administrative proceedings with possible later judicial review. *E.g.*, 42 U.S.C. §§ 2000d-1, 2000d-2. We think that the disjunctive use of both terms indicates on the face of the statute Congress' intent to award fees for both avenues of legal redress to challenged action.

Title VII contains a nearly identical fee provision,[8] and the Supreme Court has repeatedly noted that "the

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(Continued from previous page)

(Title VII plaintiff may recover attorney's fees for optional, collateral federal administrative proceeding that aided ultimate settlement of dispute), *cert. denied*, 461 U.S. 956 (1983). Plaintiffs' participation in the *ECOS* action was part of their overall strategy, and whether or not it alone was a catalyst to the relief they obtained, the facts and plaintiffs' theories in the *ECOS* action were intimately connected with their administrative complaint.

8. In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 2000e-5(k).

provision for counsel fees in § 1988 was patterned upon the attorney's fees provisions contained in Titles II and VII of the Civil Rights Act of 1964," and that "the legislative history of § 1988 indicates that Congress intended that 'the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act.'" Hensley v. Eckerhart, 461 U.S. 424, 433 n.7, (1983) (quoting S. Rep. No. 1011, 94th Cong., 2d Sess. 4 (1976)). In New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980), the Court addressed the same interpretation argument that defendants make here and held that Title VII does authorize a fee award for work done in state administrative and judicial proceedings:

> The words of [the statute] leave little doubt that fee awards are authorized for legal work done in "proceedings" other than court actions. Congress' use of the broadly inclusive disjunctive phrase "action or proceeding" indicates an intent to subject the losing party to an award of attorney's fees and costs that includes expenses incurred for administrative proceedings. . . . It cannot be assumed that the words "or proceeding" in § 706(k) are mere surplusage.

447 U.S. at 61. We think that the same reasoning applies to § 1988. Moreover, Congress' expressed policy of uniformity among the fee statutes will be furthered by adopting the same construction of identical language.

Plaintiffs' "proceeding" before DOT meets the further qualification that it be "to enforce a provision of" one of the listed laws. Title VI is one of those listed

statutes, and plaintiffs' primary[9] claim in the administrative complaint was that the proposed highway extension would violate Title VI. Moreover, the purpose of the regulations under which plaintiffs filed their administrative complaint "is to effectuate the provisions of Title VI of the Civil Rights Act of 1964," 49 C.F.R. § 21.1, so we have no hesitancy in concluding that plaintiffs meet the literal terms of § 1988.

Defendants argue that we should make "no distinction whether the administrative proceeding in question is or is not to enforce Title VI but only whether it is mandatory." Thus, a mandatory proceeding would be an "action or proceeding" "to enforce a provision of" Title VI, but an optional proceeding would not fall within that same definition. Other courts have attributed some significance to the optional/mandatory distinction, but we are not persuaded that it should control for Title VI, and therefore we need not address the district court's conclusion, which both sides accept, that Title VI does not require exhaustion of administrative remedies. *See* 598 F. Supp. at 262 (citing Chowdhury v. Reading Hospital and Medical Center, 677 F.2d 317 (3 Cir. 1982), *cert. denied*, 463 U.S. 1229 (1983)).

As we have said, the language of § 1988 provides broadly that "in *any* action *or proceeding to enforce a*

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9. Plaintiffs included several other claims, see note 2 *supra*, but the bulk of their discussion in the administrative complaint concerned racial discrimination. The Title VI claim is what generated DOT's investigation and preliminary finding of discrimination and what prevented defendants from proceeding with their plans. The record does not indicate what, if anything, became of plaintiffs' non-Title VI claims.

provision of . . . Title VI . . ., the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs," 42 U.S.C. § 1988 (emphasis added), and the scheme of Title VI confirms what the language of § 1988 suggests. The Department of Transportation regulations under which plaintiffs filed their administrative complaint were specifically established to enforce federal rights created by Title VI,[10] so we conclude as a matter of normal statutory interpretation that Congress meant to include them within § 1988's use of the term "proceeding." Moreover, Title VI does not explicitly authorize a private right of action,[11] but it does authorize judicial review of agency action taken to effectuate its purposes. 42 U.S.C. § 200d-2. The federal[12]

10. Title VI directed all federal agencies "to effectuate the provisions of section 2000d of this title . . . by issuing rules, regulations, or orders of general applicability." 42 U.S.C. § 2000d-1. DOT did issue such regulations, which are titled in part "Effectuation of Title VI of the Civil Rights Act of 1964".

11. In Sumpter v. Harper, 683 F.2d 106, 109 n.4 (4 Cir. 1982), we rejected a specific private claim under Title VI but reserved "the broader question of whether *any* right of action is available to a private litigant under [Title VI]." (original emphasis). We similarly express no opinion on the latter issue.

12. The Court in *Carey* rejected the argument that "proceeding" under Title VII should be limited to *federal* administrative proceedings, but acknowledged that such an interpretation "at least would not render the words 'or proceeding' a complete nullity." 447 U.S. at 62. We do not adopt such an interpretation independently, but we recognize that as a practical matter our analysis may lead to that result under Title VI. That title applies to "any program or activity receiving Federal financial assistance," and, while it is certainly possible for the states to have administrative procedures that may be able to redress alleged violations of Title VI, those procedures are not mandated by Congress and presumably they can fare no better than the state-created procedures in *Webb*. *See* Section IV *infra*.

administrative proceedings for which plaintiffs seek compensation thus may be analogized to the mandatory state procedures in *Carey*: They are the primary and perhaps the only remedy for violation of that title.[13]

Since the meaning of § 1988 seems so clear on its face, resort to legislative history or policies is hardly required. We note, however, that they confirm our interpretation of § 1988. The legislative history of Title VI does contain numerous references to "suits," "courts," and "judicial process," but these are references only to the usual method of enforcing most of the civil rights statutes listed in § 1988. Certainly there is no affirmative indication that Congress meant to nullify the term "proceeding" that it used in § 1988. To the contrary, we believe that the expressed purposes "to remedy anomalous gaps in our civil rights laws . . . and to achieve consistency in our civil rights laws," Senate Report, *supra* note 13, at 1, the explicit references to Title VII, *id.* at 2, 3, 4, and the renewed instruction to "the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights laws," *id.* at 3, all support our conclusion.

III.

So far as we are aware, only the Third Circuit has considered the precise question before us, i.e., the pro-

13. *Cf.* S. Rep. No. 1011, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5913 (hereinafter cited as "Senate Report") ("[T]he Committee has found that fee awards are essential if the Federal statutes to which [§ 1988] applies are to be fully enforced. We find that the effects of such fee awards are ancillary and incident to securing compliance with these laws, and that fee awards are an integral part of the remedies necessary to obtain such compliance.").

priety of awarding attorney's fees under § 1988 for work done in connection with administrative proceedings to enforce Title VI. In NAACP v. Wilmington Medical Center, Inc., 689 F.2d 1161, 1170-71 (3 Cir. 1982), *cert. denied,* 460 U.S. 1052 (1983), the Third Circuit held that prevailing plaintiffs could recover attorney's fees for work related to an administrative proceeding to which they were not parties but which was prompted by the litigation so long as that work contributed to their ultimate success. The court relied simply on the language of the statute and the Supreme Court's reasoning in *Carey.*

In Latino Project, Inc. v. City of Camden, 701 F.2d 262 (3 Cir. 1983), a different panel of the Third Circuit distinguished *Wilmington Medical Center* on the ground that plaintiffs in that case had initially filed a complaint in district court, while the plaintiffs in *Latino Project* had succeeded, if at all,[14] at the administrative level without ever filing suit in court. The *Latino Project* panel held that " a plaintiff who has not filed a civil complaint on the merits of a claim under one of the civil rights statutes enumerated in [§ 1988] is not entitled to attorney's fees . . . .even though he may have obtained substantial relief in an administrative proceeding." *Id.* at 265. We respectively doubt the correctness of that holding,[15] but in

14. Plaintiffs in *Latino Project* challeneged a municipality's administration of block grant funds, and the HUD area supervisor concluded that the city had not discriminated in using those funds. Plaintiffs took no further legal action, other than seeking their attorney's fees in district court.

15. It is perhaps significant that the *Latino Project* panel began its "analysis of section 1988 by noting the ambiguity of the words *'civil* action or proceeding,' " *id.* at 263 (emphasis added). This was a misquotation of the language of § 1988, and *Latino Project* uniformly misquotes § 1988 by adding the word "civil" before "action or proceeding." It is possible that the correctness of the conclusion which we doubt is attributable to this initial and repeated error.

any event, ours is not that case. In the case before us, there was intervention in a case pending in court, and for all practical purposes, intervention was permitted.

IV.

Defendants contend that the reasoning in Webb v. Board of Education of Dyer County, 471 U.S. — , 85 L.Ed.2d 233, 105 S.Ct. 1923 (1985), and other non-Title VI cases compels a conclusion different from what the face of the statute indicates. We disagree. The petitioner in *Webb* was a black man who was fired from his position as a tenured public elementary school teacher. He obtained counsel and challenged his discharge at several hearings before the county board of education on the grounds that the discharge was racially motivated, that it violated his right to due process, and that it violated state laws governing teachers' dismissals. He was unsuccessful before the board, so he filed a complaint in federal district court, alleging that his rights under the Constitution and 42 U.S.C. §§ 1981, 1982, 1983, and 1985 had been violated. The parties settled the federal suit by agreeing that Webb would be reinstated and awarded $15,400 in damages. Upon litigation of the attorney's fees issue, the board conceded that Webb was a prevailing party, but it contended that the fee should be no more than $5,000, rather than the $21,165 requested. The district court ruled in Webb's favor on all issues except his claim for fees before the state tribunals, and it awarded a fee of $9,734.38 plus expenses.

Webb argued on appeal (1) that the school board hearings were "proceeding[s] to enforce a provision of [§ 1983]" within the meaning of § 1988, and (2) that the

time spent in those hearings was nevertheless compensable as reasonably spent in preparation for the court action. On the first point, the Court noted the similarity between § 706(k) of Title VII and § 1988, but it stated that "the reasoning in Carey is not applicable to this case," because § 1983 contains no exhaustion requirement, as Title VII does,[16] and because "the school board proceedings in this case simply do not have the same integral function under §1983 that state administrative proceedings have under Title VII." 85 L.Ed.2d at 240-41. The Court stated:

> Congress only authorized the district courts to allow the prevailing party a reasonable attorney's fee in an "action or proceeding to enforce [§1983]." Administrative proceedings established to enforce tenure rights created by state law simply are not any part of the proceedings to enforce § 1983, and even though the petitioner obtained relief from his dismissal in the later civil rights action, he is not automatically entitled to claim attorney's fees for time spent in the administrative process on this theory.

Id. at 241 (footnotes omitted).

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16. The Court said:

> Carey, however, arose under a statute that expressly requires the claimant to pursue available state remedies before commencing proceedings in a federal forum. There is no comparable requirement in § 1983, and therefore the reasoning in Carey is not applicable to this case. . . .
>
> The difference between Carey and this case is that in Carey the statute that authorized fees, Title VII, also required a plaintiff to pursue available state administrative remedies. In contrast, nothing in § 1983 requires that a plaintiff exhaust his administrative remedies before bringing a § 1983 suit.

85 L.Ed.2d at 240-41 (footnote omitted) (quoting Smith v. Robinson, 468 U.S. —, 104 S.Ct. 3457, 82 L.Ed.2d 746, 764 n.14 (1984)).

The Court in *Webb* then went on to consider petitioner's second theory—that even if there was no automatic entitlement for the time spent on the administrative proceedings, that time was reasonably expended in preparation for the later litigation. It emphasized that each case must be decided on its own facts, and that although some services performed before formally filing a lawsuit are compensable under § 1988, it was not error for the district court to exclude the five years of easily separable administrative time in computing a "reasonable attorney's fee" for Webb's counsel. *Id.* at 241-43.[17]

What we find most significant about *Webb* is not that it denied an increase in fees to a prevailing § 1983 plaintiff, but that it did so on a basis that did not categorically exclude administrative proceedings from § 1988. We deem this an indication that in an appropriate case such fees may be recoverable,[18] and we believe that *Webb's* reason-

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17. The Court concluded:

> "We reemphasize that the district court has discretion in determining the amount of a fee award." [Hensley v. Eckerhart, 461 U.S. 424, 437 (1983)]. When such an award is appealed, the reviewing court must evaluate its reasonableness with appropriate deference. Considering the governing legal principles, the petitioner's burden of establishing his entitlement to the requested fee, and the evidence and arguments presented below, we conclude that the District Court's decision to deny any fees for time spent pursuing optional administrative remedies was well within the range of reasonable discretion.

85 L.Ed.2d at 243.

18. *See id.* at 243-49 (Brennan, J., concurring in part and dissenting in part) (Court's conclusion authorizes limited awards of fees under § 1988 for work performed in optional state administrative proceedings); Delaware Valley Citizens' Council for Clean Air v. Pennsylvania, 762 F.2d 272, 277 n.7 (3 Cir. 1985) ("[T]he Supreme Court recently held in *Webb* . . . that fees may be recovered under 42 U.S.C. § 1988 for time spent by counsel pursuing 'optional administrative proceedings,' . . . so long as counsel's work 'was both useful and of a type ordinarily necessary to advance the [civil rights] litigation' to the point where the party prevailed.").

ing further suggests this is such an appropriate case. In all three of the most pertinent Supreme Court cases—*Carey, Smith,* and *Webb*—the Court applied the attorney's fees statutes as written but examined the congressional enforcement scheme for the underlying rights involved to see if the particular proceedings for which fees were sought were part of those statutory schemes. The Court has concluded that certain state administrative proceedings do qualify under Title VII and that mandatory Education of the Handicapped Act and optional state tenure proceedings do not qualify under §§ 1983 and 1988. We believe that each provision listed in § 1988 must be examined separately, *cf.* Redd v. Lambert, 674 F.2d 1032, 1036-37 (5 Cir. 1982) (disallowing fees for plaintiff whose § 1983 claim was not decided by the state courts but carefully distinguishing 28 U.S.C. § 1341 from Title VII and *Carey* on the basis of § 1341's remedial scheme), and that the enforcement scheme of Title VI aligns it solidly with Title VII rather than with § 1983. Resort to optional administrative proceedings that are creatures of state law cannot be linked to the congressional enforcement scheme under § 1983, so there is no apparent basis to infer that Congress intended to include them within § 1988 when it drafted that statute. In contrast, mandatory state procedures under Title VII and certain federal procedures under Title VI are important parts of the statutory enforcement scheme. As we discussed above, the proceedings that plaintiffs initiated here certainly serve an "integral function," *Webb,* 85 L.Ed.2d at 241, under Title VI.

V.

Since we hold that plaintiffs' claim is explicitly covered by the language of § 1988, we consider next whether

they may bring an independent action in federal district court solely to recover fees for an administrative complaint that has already been settled. Section 1988 provides that "*the court,* in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs," and DOT's regulations implementing Title VI contain no provision for awarding attorney's fees. Thus, it follows that plaintiffs *must* apply to a court for their fees.

There is authoritative support for our reading that prevailing Title VI plaintiffs may bring an independent action in federal court to recover attorney's fees. Title VI's enforcement scheme is similar to Title VII's in that they both rely heavily on administrative proceedings in the first instance. The Supreme Court stated in *Carey* that there were no insurmountable barriers to recognition of such an independent action under Title VII:

> We agree with the District Court that the availability of a federal fee award for work done in state proceedings following EEOC referral and deferral should not depend upon whether the complaintant ultimately finds it necessary to sue in federal court to obtain relief other than attorney's fees. But our agreement with the District Court compels us to reject its conclusion. It would be anomalous to award fees to the complainant who is unsuccessful or only partially successful in obtaining state or local remedies, but to deny an award to the complainant who is successful in fulfilling Congress' plan that federal policies be vindicated at the state or local level. Since it is clear that Congress intended to authorize fee awards for work done in administrative proceedings, we must conclude that § 706(f)(1)'s authorization of a civil suit in federal court encompasses a suit solely to obtain an award of attorney's fees for legal work done in state and local proceedings.

447 U.S. at 65-66. We believe the same anomalous consequences would result here if we were to deny fees solely because plaintiffs resolved their dispute without court action, as Title VI and its implementing regulations encouraged them to do.

Some cases have stated that § 1988 does not create an independent cause of action, but the district court correctly distinguished these as having been decided before, or relying on reasoning that does not apply after, the 1976 amendment to § 1988 that added the attorney's fee provision at issue here. 598 F. Supp. at 262. The two cases defendants cite, Estes v. Tuscaloosa County, 696 F.2d 898 (11 Cir. 1983), and Horacek v. Thone, 710 F.2d 496 (8 Cir. 1983), may also be distinguished on the ground that the attorney's fees sought in those cases were incurred in state administrative proceedings that did not concern enforcement of the civil rights statutes. Section 1988 clearly does not apply and does not create an independent cause of action in such circumstances.

Even is some type of court action were required to trigger § 1988's fee provision, plaintiffs would still have a claim to fees by virtue of their proposed complaint and motion to intervene in the *ECOS* action. That motion was never formally granted or denied, but the defendants in that action recognized plaintiffs' status by including them in the consent settlement. Indeed, the fact that the consent judgment was not filed until the Final Mitigation Plan had been fully negotiated and only one day before the Plan's formal execution suggests that plaintiffs were the controlling force in final settlement of the *ECOS* action. Plaintiffs were in a comparable position to a plaintiff whose suit is settled after merely filing a complaint,[19] and we think such a party would also be considered sufficiently prevailing in a civil "action" to merit an award of attorney's fees.

VI.

To summarize, we hold that plaintiffs who prevailed on their Title VI claim at the administrative level may recover their attorney's fees and costs for work performed in connection with those proceedings[20] in an independent action in federal district court. Therefore, we reverse the judgment of the district court and remand for determination of a reasonable fee.

REVERSED AND REMANDED.

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19. The legislative history of § 1988 supports our conclusion. *Cf.* Senate Report, *supra* note 13, at 4 n.4 ("In the large majority of cases the party or parties seeking to enforce such rights will be the plaintiffs and/or plaintiff-intervenors."); *id.* at 5 ("Moreover, for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief."); H.R. Rep. No. 1558, 94th Cong., 2d Sess. 7 (1976) (a court should still award fees when a defendant voluntarily ceases the unlawful practice after a complaint is filed); *see also Carey, supra* (federal suit dismissed after complaint, answer, and one pretrial conference).

20. We consider the proceedings in the district court and on this appeal as connected to plaintiffs' underlying Title VI claim. Plaintiffs may properly request payment for them.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA DURHAM DIVISION

C-83-1239-D

CREST STREET COMMUNITY COUNCIL, INC., RESIDENTS OF CREST STREET COMMUNITY, and SAVE OUR CHURCH AND COMMUNITY COMMITTEE,

Plaintiffs

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, NORTH CAROLINA BOARD OF TRANSPORTATION and WILLIAM R. ROBERSON, as Secretary of the North Carolina Department of Transportation and Chairman of the North Carolina Board of Transportation,

Defendants

MEMORANDUM OPINION AND ORDER

(Filed November 29, 1984)

WARD, Chief Judge

This is an action to recover attorney's fees incurred in previous administrative and judicial proceedings either between or involving the parties to this action. Before the Court are defendants' Motion to Dismiss (August 8, 1984) for failure to state a claim and for judgment on the pleadings, Fed.R.Civ.P. 12(b) & (c), and plaintiffs' Motion for Summary Judgment (August 8, 1984) pursuant to Rule 56, Fed.R.Civ.P. Inasmuch as matters outside the pleadings were presented and not excluded, the Court will treat and dispose of defendants' Rule 12 motion as one for summary judgment pursuant to Rule 12(b) (6) & (c), Fed.R.Civ.P.

The parties submitted extensive briefs and documentary evidence and were heard in oral argument on November 1, 1984.

FACTS

The plaintiffs are organizations representing residents of Crest Street community, a cohesive, predominately black, low-income neighborhood in Durham, North Carolina. For quite some time the City of Durham had requested, and defendant North Carolina Department of Transportation (NCDOT) had planned, extension of a highway known as the East-West Freeway through, and with a major interchange in, the midst of the Crest Street community. As proposed by NCDOT in 1976, the highway extension would displace much of the community.

In March 1977, the North Carolina Legal Assistance Program was retained to represent residents of the Crest Street community concerning efforts against the East-West Freeway. In September 1978, plaintiffs Residents of Crest Street Community and Save Our Church and Community Committee, through counsel, filed an Administrative Complaint with the United States Department of Transportation (USDOT) seeking an investigation of the practices of NCDOT and the Federal Highway Administration for compliance with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and 49 C.F.R. §21.[1] Title VI provides:

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[1]In addition to alleging that the freeway proposal was violative of Title VI, the Administrative Complaint also challenged the proposal under provisions of the National Environmental Policy Act, 42 U.S.C. § 4331, the Federal-Aid Highway Act, 23 U.S.C. § 109, and Title VIII of the Civil Rights Act of 1968 (fair housing), 42 U.S.C. § 3601.

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Part 21 of the Code of Federal Regulations was promulgated to effectuate the provisions of Title VI in any program or activity receiving federal money from the USDOT. 49 C.F.R. § 21.1. The Administrative Complaint sought prohibition of further planning or construction of the freeway by NCDOT and rejection by USDOT of the NCDOT Enviromental Impact Statement until the freeway project was brought into compliance with applicable laws. Affidavit of Willie Patterson, Exhibit A (August 8, 1984).

USDOT conducted a field investigation into the freeway proposals and the allegations of the Administrative Complaint. On February 20, 1980, the USDOT Director of the Office of Civil Rights informed NCDOT of its preliminary judgment finding reasonable cause to believe that construction according to the NCDOT proposal would constitute a prima facie violation of Title VI, in particular, section 21.5(b)(3), 49 C.F.R., which provides:

> In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding persons from, denying them the benefits of, or subjecting them to discrimination under any program to which this regulation applies, on the grounds of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act of this part.

Patterson Affidavit, Exhibit B. This belief led the complainants, NCDOT, and the City of Durham into extensive negotiations towards conciliation of their differences.

In February 1982, plaintiff Crest Street Community Council, Inc. (Council), the City of Durham, and NCDOT reached a preliminary agreement for the freeway design, relocation assistance benefits, and other assistance in mitigation of the construction. Negotiations for a final mitigation plan toward ultimate resolution of all issues raised by the Administrative Complaint continued.

In August 1982, NCDOT moved to dissolve a 1973 injunction in *ECOS, Inc. v. Brinegar*, C-352-D-72 (M.D.N.C. February 20, 1973), which had enjoined construction of the freeway.[2] The Council and Willie Patterson, a resident of the Crest Street community, moved to intervene in *ECOS* on October 15, 1982. Patterson Affidavit, Exhibit C. The intervention motion was never ruled on, but the applicants for intervention were parties to a December 14, 1982 Consent Judgment dissolving the injunction and dismissing the *ECOS* action. The Consent Judgment provided, *inter alia*, that the state highway defendants and applicants for intervention had

> resolved the things and matters in controversy between them by agreement adopted by the North Carolina Board of Transportation on November 19, 1982.

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[2]Plaintiffs in the *ECOS* action were ECOS, Inc. (a nonprofit, educational, ecological corporation), an association of Duke University students and some of its members, and two Durham residents. The defendants were state and federal transportation officials and a construction company. The action had alleged violations of the public hearing requirement and the preservation of parkland requirements of the Federal-Aid Highway Act, 23 U.S.C. §§ 128 & 138, the parkland preservation policy of the Department of Transportation Act of 1966, 49 U.S.C. § 1653(f), and the National Environmental Policy Act of 1969, 42 U.S.C. § 4332 . The injunction enjoined steps toward construction of a particular section of the proposed freeway until full compliance with the statutes allegedly violated had been achieved.

> The plaintiffs and applicants for intervention do not or no longer oppose the State defendants' motion to dissolve the injunction and do not wish to prosecute this action any further except that the applicants for intervention explicitly reserve the right to pursue all claims in their application for intervention in the event said agreement is not fully implemented, and in addition reserve their claim for attorney fees against the State defendants and the North Carolina Department of Transportation and the plaintiffs reserve their right to pursue all claims relating to the section of expressway proposed to be constructed between U.S. Highway 15-501 and Interstate 85.

Patterson Affidavit, Exhibit F, ¶ 8.

On December 15, 1982, the day following the filing of the Consent Judgment, the Council, NCDOT, and the City of Durham executed the Final Mitigation Plan (Plan). The Plan sets out in a comprehensive fashion efforts to be made by the City and NCDOT to mitigate the detrimental impact of the freeway on the Crest Street community. Plaintiffs contend that under the terms of the Plan, they were accorded very substantial relief.[3] First, a new community site will be developed in the same area and will allow the residents to remain intact as a community. Second, the defendants moved the proposed highway right-of-way and modified an interchange so as to preserve the community church and park. Plaintiffs state that defendants estimated the cost of implementing their major direct responsibilities under the Plan to be $3,072,-

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[3]Apparently, plaintiffs are quite satisfied with the highway plan in its present form for they have, somewhat ironically, intervened in *West Durham Lumber Co. v. North Carolina Department of Transportation*, C-84-234-D (M.D.N.C. July 6, 1984) (action to enjoin construction) on the side of the state, local, and federal defendants in support of the proposed highway.

000. Brief in Support of Plaintiffs' Motion for Summary Judgment at 8 (August 8, 1984).

In August 1983, plaintiffs' counsel sent defendants a request for attorney's fees with a detailed listing of hours, expenses, hourly rates for various personnel, and notice of intent to seek an upward adjustment if court action became necessary. NCDOT denied liability for any fees, and plaintiffs filed this action on November 30, 1983.

DISCUSSION

The Civil Rights Attorney's Fees Award Act of 1976, amending 42 U.S.C. § 1988, in pertinent part provides:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of [the Education Amendments of 1972] or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost.

In broad terms, the issue in this case is whether plaintiffs, are prevailing parties within the meaning or scope of section 1988. More specifically, the question before the Court is whether section 1988 authorizes an award of fees for the administrative enforcement of Title VI.

Defendants contend that the plaintiffs are not entitled to relief because (1) the eleventh amendment shields defendants from an award, (2) plaintiffs failed to exhaust administrative remedies, and (3) section 1988 does not support an independent cause of action. The eleventh amendment does not preclude an award under section 1988 which would be paid out of a state treasury. Congress has plenary power to set aside states' immunity from retro-

active relief in order to enforce the fourteenth amendment. *Fitzpatrick v. Bitzer,* 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976). When Congress passed section 1988, "it undoubtedly intended to . . . authorize fee awards payable by States." *Hutto v. Finney,* 437 U.S. 678, 693-94, 98 S.Ct. 2565, — , 57 L.Ed.2d at 522, 536 (1978). *Hutto* rejects the argument that section 1988 is insufficient to overcome the eleventh amendment immunity. *Maher v. Gagne,* 448 U.S. 122, 131-32, 100 S.Ct. 2570, — , 65 L.Ed.2d 653, 662-63 (1980).

Defendants' suggestion that plaintiffs must administratively exhaust their claim for fees before proceeding in this Court is also without merit. First, Title VI does not require exhaustion. *Chowdhury v. Reading Hospital and Medical Center,* 677 F.2d 317 (3d Cir. 1982), *cert. denied,* -- U.S. —, 103 S.Ct. 786 (1983). Second, the administrative procedures of part 21, 49 C.F.R., for hearings and judicial review are available to *recipients* of federal funds to challenge an adverse decision to cut off funding, not complainants like plaintiffs. And third, under section 1988 only a court, as opposed to an administrative agency, may determine and award fees.[4]

The Court has considered whether this claim for fees should have been brought as a motion in the cause of the *ECOS* action. There is authority that section 1988 does not support an independent action. *E.g., Horacek v. Thone,* 710 F.2d 496 (8th Cir. 1983). However, such authority is premised on *Moor v. County of Alameda,* 411 U.S. 693, 98 S.Ct.

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[4]Ironically, an exhaustion of administrative remedies requirement would actually further plaintiffs' fee request rather than bar it as defendants have suggested. *See infra* pp. 11-12.

1785, 36 L.Ed.2d 596 (1973), a case decided prior to the 1976 statutory amendment which authorized attorney's fees.[5] The amending language does not on its face deviate from this holding, but the Supreme Court has recognized that section 1988 raises issues "uniquely separable" and "collateral" to the main cause of action, and that flexibility in the manner of pursuing section 1988 fees exists. *White v. Department of Employment Security,* 455 U.S. 445, 451-52, 102 S.Ct. 1162, —, 71 L.Ed.2d 325, 331 (1982) (Rule 59(e), Fed.R.Civ.P., does not apply to postjudgment fee requests, and district courts may adopt local rules establishing timeliness standards for the filing of attorney's fees claims).[6]

Plaintiffs never formally intervened in *ECOS.* During oral argument counsel stated that the presiding judge in *ECOS* did not rule on any matter concerning their claims and, therefore, would not be in a position of familiarity with the efforts for which plaintiffs now seek fees. The overwhelming majority of the fees sought were incurred in the context of the administrative proceedings or pursuant to the USDOT findings. While the Court may ultimately conclude that the fees are not recoverable because they were not incurred in the context of a judicial

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[5]In *Moor v. County of Alameda,* the Supreme Court ruled that section 1988, then free from any attorney's fee provision, does not create an action but only compliments various federal civil rights causes of action by authorizing federal courts to look to principles of state law when the federal law is unsuited or insufficient to furnish suitable remedies. 411 U.S. at 702-03, 93 S.Ct. at —, 36 L.Ed.2d at 606.

[6]Local Rule 210, effective January 1, 1985, provides that the parties to an action shall attempt to agree on a statutory attorney's fees award, and if they are unable to agree may move within 90 days of final judgment that the Court enter an award.

proceeding, to dismiss the case merely because of its nature as an action instituted independent of prior proceedings would without justification evade the real issue at hand—the propriety of awarding fees under section 1988 for Title VI administrative proceedings.

Plaintiffs' fee request spans five years and eight months, from March 1977 to December 1982, and totals 1,261.25 hours. All but thirty-seven hours, or approximately three percent of the total request, were incurred prior to the motion to intervene filed in *ECOS*. Counsel documented seven hours in preparation of the intervention motion and proposed complaint and two and one-half hours preparing the Consent Judgment. The remaining twenty-seven and one-half hours involved negotiations towards, and review of, the Final Mitigation Plan. Plaintiffs contend that the fees incurred prior to the intervention motion are compensable irrespective of the recoverability of fees for administrative work because the vast majority of counsel's efforts were necessary for the *ECOS* proceeding notwithstanding the existence of a prior administrative proceeding. The Court cannot accept this contention. The motion for intervention and proposed complaint are short and uncomplicated pleadings. Plaintiffs' motion for intervention was never tested and except for the Consent Judgment, they had no other participation in *ECOS*. It is true that the intervening twenty-seven and one-half hours of negotiations and review of the Plan would have been much greater had not the administrative matters preceded. However, to retroactively declare that efforts done over a five year period would have been required in the course of litigation later initiated would result in a highly speculative, uncertain, and unfairly surprising award of fees. Thus, the fee request for 1,224.25 hours

incurred prior to any action by plaintiffs in a judicial forum may not be piggy-backed onto the *ECOS* related hours but may be granted only to the extent, if any, that section 1988 applies to administrative proceedings.

This is a question not yet answered by the United States Supreme Court or the Court of Appeals for the Fourth Circuit. *See Cain v. Virginia,* 582 F.Supp. 531 (W.D. Va. 1984) (Fourth Circuit has not decided whether section 1988 permits fees in optional administrative hearings or prior state judicial proceedings not an integral part of the federal remedy). There is, however, persuasive authority from other circuit courts of appeals holding that section 1988 does not authorize fees for actions or proceedings other than judicial in nature. *Webb v. Board of Education,* 715 F.2d 154 (6th Cir. 1983), *cert. granted,* — U.S. —, 80 L.Ed.2d 456 (1984); *Latino Project, Inc. v. City of Camden,* 701 F.2d 262 (3d Cir. 1983); *Reed v. Lambert,* 674 F.2d 1032 (5th Cir. 1982); *Blow v. Lascaris,* 668 F.2d 670, 671 (2d Cir.), *cert. denied,* 459 U.S. 914 (1982).

In *Latino Project, Inc. v. City of Camden,* 701 F.2d 262, the plaintiff filed an administrative complaint with the Department of Housing and Development (HUD) challenging the use of federal housing funds under Title VI. HUD did not find a violation but the defendant later revised its housing proposals in such a way which led the plaintiff to believe it had prevailed in the administrative Title VI efforts. As a result, it filed a section 1988 action without having filed a complaint on the merits.

The Third Circuit began its review of the case, as this Court must, with the words of the statute[7] and found the phrase "civil action or proceeding" subject to different interpretations.

> Despite the literal ambiguity of the words "civil action or proceeding", the statutory context of those words indicates that Congress intended section 1988 to authorize an award of attorney's fees only to a party who substantially prevails on a civil rights claim in a lawsuit. Specifically, section 1988 provides that "in any civil action or proceeding . . . the *court* . . . may allow reasonable attorney's fees." (emphasis added). Congress' use of the term "court" within the same sentence that contains the words "civil action or proceeding" leads us to believe that Congress had in mind only a lawsuit when it used those words.

Latino Project, Inc. v. City of Camden, 701 F.2d at 264.

The Supreme Court has examined identical language from the attorney's fee provision of Title VII, 42 U.S.C. § 2000e-5(k), in *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 100 S.Ct. 2024, 64 L.Ed.2d 723 (1980), and found that "proceeding" included state administrative and judicial proceedings.[8] Plaintiffs contend that *Carey*

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[7]The starting point for interpreting a statute is the language of the statute itself. *Consumer Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 1051, —, 64 L.Ed.2d 766, 772 (1980).

[8]Fees for federal administrative proceedings under Title VII, such as those before the EEOC, were not at issue in *Carey*, but the Supreme Court noted that several Courts of Appeals, including the Fourth Circuit in *Johnson v. United States*, 554 F.2d 632 (4th Cir. 1977), had upheld awards for work done in required administrative proceedings. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. at 62 n.2, 100 S.Ct. at —, 64 L.Ed.2d at 733 n.2.

is precedent for adopting an identical interpretation under section 1988. There are, however, reasonable grounds upon which to distinguish the *Carey* holding from section 1988. *Carey* was not decided solely on an interpretation of the phrase "civil action or proceeding." The Supreme Court was persuaded only after examining the history of section 2000e-5(k), 42 U.S.C., other provisions of Title VII, and the nature of the congressionally mandated enforcement mechanism of Title VII. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. at 61-62, 64 L.Ed.2d at 732-33; *see Webb v. Board of Education*, 715 F.2d 254 (*Carey* does not control issue under section 1988; "action or proceeding" is ambiguous).

The legislative history also invites differing analyses. As stated by the Senate Committee on the Judiciary, the purpose of section 1988 "is to remedy anomalous gaps in our civil rights laws created by . . . *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 [95 S.Ct. 1612, 44 L.Ed.2d 141](1975) and to achieve consistency in our civil rights laws," and "it is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act." S. Rep. No. 1011, 94th Cong., 2d Sess. 1, 4 *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5909, 5912. However, the same Senate Report more strongly supports the opposite conclusion because the notion that attorney's fees are available for services rendered *in court* permeates the legisla-

tive history.[9] *Webb v. Board of Education,* 715 F.2d at 258; *Latino Project, Inc. v. City of Camden,* 701 F.2d at 264; *Blow v. Lascaris,* 668 F.2d at 671.

Title VII requires that claimants timely seek pre-litigation administrative relief either from authorized state or local agencies or from the EEOC. 42 U.S.C. § 2000e-5(c) & (e). In contrast, neither Title VI nor any of the other laws encompassed by section 1988 require exhaustion of administrative remedies. *Webb v. Board of Education,* 715 F.2d at 257. While administrative remedies are available under Title VI, unlike Title VII there is no congressional policy favoring exhaustion of any of the laws listed in section 1988. This is a critical distinction between *Carey* and the instant case and justifies limiting the effect of *Carey* to its facts.

Plaintiffs argue that denial of fees for administrative proceedings will render such proceedings obsolete. Given attorneys' obligation to serve the best interests of their clients, proceedings such as those invoked here surely would not become things of the past. Moreover, issues in litigation which are suited for administrative resolution may be directed to an administrative agency by a presid-

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[9]For example,

> [Section 1988] is designed to allow courts the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts. . . . In many cases arising under our civil rights laws, the citizen who must sue has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights . . . [they] must have the opportunity to recover what it costs them to vindicate these rights in court.

S. Rep. No. 1011, 94th Cong., 2d Sess. 2, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5909-10.

ing court. *See NAACP v. Wilmington Medical Center, Inc.,* 689 F.2d 1161, 1163 (3d Cir. 1982), *cert. denied,* — U.S. —, 75 L.Ed.2d 390 (1983) (district court temporarily stayed action and ordered HEW investigation). On the other hand, construction of section 1988 to include fees for administrative related events could open the door to fee requests for an array of nonjudicial proceedings which are not required or are not integral parts of one's federal court remedy. Administrative proceedings under Title VI and Title IX of the Education Amendments of 1972, which prohibit discrimination by recipients of federal funding, seem particularly unsuited for an award of fees because individuals, beyond filing an administrative complaint, have little input or control into the decisional process. This puts them at a disadvantage and likewise would make a subsequent court decision of reasonable fees, for matters which by regulation are principally between the federal government and the funding recipient, much more difficult. All things considered, while section 1988 was patterned after the counsel fee provisions of Title VII[10] and uses the familiar "courts or proceedings" phrase, its application cannot mirror Title VII because the rights accorded by Titles VI and VII are remedied in significantly different manners. The Court will, therefore, follow the persuasive authority of those appellate courts which have concluded that section 1988 does not authorize a fee award for work done in conjunction with

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[10]The Court recognizes that the standards for awarding fees under section 1988 are to be generally the same as in these model statutes. *Hensley v. Eckerhart,* — U.S. —, 103 S.Ct. —, 76 L.Ed.2d 40, 50 n.7 (1983). However, the "standards" for fees refers the interpretation of who is a "prevailing party," not where their prevalence is entitled to statutory fees.

administrative proceedings.[11] "[A] plaintiff who has not filed a civil complaint on the merits of a claim under one of the civil rights statutes enumerated in . . . section 1988 is not entitled to attorney's fees . . . even though he may have obtained substantial relief in administrative proceedings." *Latino Project, Inc. v. City of Camden,* 701 F.2d at 265.

Plaintiffs argue that because in September 1978 when they filed their administrative complaint "several courts" had held that administrative exhaustion was a prerequisite to a Title VI lawsuit, it was reasonable for them to believe that an administrative complaint was mandatory. In *Cain v. Virginia,* 582 F.Supp. 531 (W.D. Va. 1984), fees for state administrative and judicial work were allowed because of a federal district court decision that an employee allegedly denied due process must appeal an arbitration decision to state court before starting a federal court action. The pendency of that ruling justified the *Cain* plaintiff's state court actions even though the district court decision was later reversed. Counsel does not suggest that he made a calculated decision to file an administrative complaint rather than institute a lawsuit after having considered the optional or mandatory nature of part 21,

[11]Plaintiff cites three cases which if followed would lead to a contrary result. One, *NAACP v. Wilmington Medical Center,* 689 F.2d 1161 (3d Cir. 1982), *cert. denied,* — U.S. —, 75 L.Ed.2d 390 (1983), was specifically rejected in *Latino Project, Inc.,* a subsequent Third Circuit case, as standing for the proposition that "action or proceeding" included administrative proceedings. The other two, *Ciechon v. City of Chicago,* 686 F.2d 511 (7th Cir. 1982) and *Brown v. Vathke,* 568 F.2d 634 (8th Cir. 1978) are rejected because they ruled without addressing the crucial optional/mandatory distinction between Title VII and the laws encompassed by section 1988.

49 C.F.R. The Court recognizes that in September 1978, there was authority holding that exhaustion was necessary under Title VI. *Santiago v. City of Philadelphia,* 435 F. Supp. 136, 158 (E.D. Pa. 1977); *NAACP v. Wilmington Medical Center,* 426 F.Supp. 919 (D. Del. 1977), *rev'd,* 599 F.2d 1247 (3d Cir. 1979). However, it is well settled that the doctrine of exhaustion of administrative remedies does not apply where the particular agency lacks procedure for complainants to trigger and participate in the administrative process. *Rosado v. Wyman,* 397 U.S. 397, 406, 90 S.Ct. 1207, —, 25 L.Ed.2d 442, 452 (1970). While one *may,* as the Council did in 1978, file a complaint with the USDOT, filing does not initiate an adversary type proceeding involving the complainant nor is there any remedial provision for the complainant. 21 C.F.R. § 21.11. From that point forward, the complainant is not a mandatory party to the USDOT investigation nor to any action or inaction taken with respect to the recipient of federal funds. The Supreme Court recognized the shortcomings of such an administrative format in *Cannon v. University of Chicago,* 441 U.S. 677, 706-07 n.41, 99 S.Ct. 1946, —, 60 L.Ed.2d 560, 581-82 n.41 (1979), noting that exhaustion under Title IX is not appropriate because, as in Title VI, a complainant is not assured an investigation on the merits, participation in any investigation, or relief even if the government finds a violation. The permissive and limited nature of a complainant's role in the administrative enforcement mechanism illustrates, as it did in 1978,[12] that exhaustion is not required under Title VI.

[12]The regulations in effect in 1978 are not different in any manner relevant here from those currently in effect. 49 C.F.R. § 21 (1978).

Even though the Court finds that the administratively initiated work is not compensable under section 1988, the question remains whether any of the ECOS related work is compensable. A prevailing party is one who succeeds on any significant issue in litigation which achieves some of the benefit the party sought in bringing the suit, *Hensley v. Eckerhart,* — U.S. —, 103 S.Ct. —, 76 L.Ed.2d 40, 50 (1983), and a consent judgment short of final adjudication may support an award of fees. *DeMier v. Gondles,* 676 F.2d 92, 93 (4th Cir. 1982). In such circumstances,

> the court must focus on the condition that the fee claimant sought to change so as to gain a benefit or be relieved of a burden. With this condition as a benchmark, the inquiry then becomes "whether, as a quite practical matter the outcome, in whatever form it is realized, is one to which the plaintiff fee claimant's efforts contributed in a significant way, and which does involve an actual conferral of benefit or relief from burden when measured against the benchmark condition."

DeMier v. Gondles, 676 F.2d at 93 (quoting *Bonnes v. Long,* 599 F.2d 1316, 1319 (4th Cir. 1979), *cert. denied,* 455 U.S. 961 (1982)).

Plaintiffs did not initiate the *ECOS* action and they were never allowed to intervene. Through intervention, they sought (1) an injunction prohibiting extension of the highway and (2) declaration that the defendants' practices violated Title VI and other laws. Patterson Affidavit, Exhibit C. They obtained neither. Furthermore, even if plaintiffs had been allowed to intervene, their opposition to dissolution of the injunction would not be entitled to fees because the ECOS injunction had only prohibited construction pending compliance with laws *other than Title VI.* The proposed highway was never judicially

enjoined, at the behest of plaintiffs or anyone, on the ground that it would violate Title VI.

Although not set forth in the intervention motion and proposed complaint, it is obvious that the purpose of the attempted intervention was to prompt speedy execution of the Final Mitigation Plan. The Plan was executed the day following the Consent Judgment; however, the Consent Judgment recites that the state defendants and applicants for intervention had already resolved their differences by agreement adopted November 19, 1982. As a practical matter, there is no evidence that the *ECOS* fee efforts, limited to seven hours of preparing the intervention motion and two and one-half hours for drafting the Consent Judgment, significantly contributed to the execution of the Plan. The twenty-seven and one-half hours of final negotiations between these two events were preceded by many months and numerous hours of serious negotiations following the USDOT prima facie finding of a Title VI violation. Plaintiffs do not suggest that resolution of final details had become uncertain. Final settlement seemed imminent. Plaintiffs have not shown that their "participation" in *ECOS,* an action to which they were not parties, was even a catalyst to the Plan.

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CONCLUSION

The issue presented by this case is a difficult one. Without question the plaintiffs' interests were well served by their counsel. Yet, the general rule in this country in the absence of specific legislative authority is that litigants bear their own costs. The argument that section 1988 is

authority for fees incurred administratively as well as judicially is not an unreasonable one. However, in the absence of persuasive direction from Congress or controlling judicial authority and considering the nature of remedies afforded by Title VI and the other laws encompassed by section 1988, the Court concludes that the argument must fail.

IT IS, THEREFORE, ORDERED that defendants' motion to dismiss or for judgment on the pleadings be, and the same hereby is, GRANTED, and that plaintiff's motion for summary judgment be, and the same hereby is, DENIED.

A Judgment will be entered accordingly.

/s/ Hiram H. Ward
United States District Judge

November 29, 1984.

Supreme Court, U.S.
FILED
DEC 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-767

In The

Supreme Court of the United States

October Term, 1985

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, NORTH CAROLINA BOARD OF TRANSPORTATION, and JAMES E. HARRINGTON, as Secretary of the North Carolina Department of Transportation and Chairman of the North Carolina Board of Transportation,

Petitioners,

v.

CREST STREET COMMUNITY COUNCIL, INC., RESIDENTS OF CREST STREET COMMUNITY, and SAVE OUR CHURCH and COMMUNITY COMMITTEE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

BRIEF OF RESPONDENTS IN OPPOSITION

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STATEMENT OF THE CASE

Petitioners, in their statement of the case, omit many of the findings of fact joined in by both the Court of Appeals and the District Court and they do not explain the context of the two courts' decisions, vis-a-vis this court's recent decision in *Webb v. Board of Education of Dyer County*, 471 U.S. —, 105 S. Ct. 1923, 85 L.Ed. 2d 233, (1985). These findings and the context of these decisions help explain the actions of the courts below and also help show why granting certiorari is inappropriate in this case. Therefore, they are set out as follows.[1]

Respondents, the prevailing parties in a federal administrative proceeding under Title VI of the Civil Rights Act of 1964 and in a related federal court action, filed a claim under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. Section 1988, to recover attorneys fees and expenses. Respondents are civic and church organizations representing the Crest Street Community, a long-established, cohesive, black neighborhood in Durham, North Carolina.[2] For many years petitioner North Carolina Department of Transportation (NCDOT) proposed

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1. Except where noted otherwise, the following statement of the case is taken from the findings of the courts below, reprinted in Petitioners' Appendix, pp. 1-40.

2. The Residents of Crest Street Community and the Save Our Church and Community Committee are unincorporated associations representing the interests of the residents of the Crest Street Community and the New Bethel Missionary Baptist Church, which is located within the Crest Street Community. In 1980 the Crest Street Community Council, Inc. was incorporated and assumed the functions of these two associations. Other than this affiliation, there are no parent companies, subsidiaries or affiliates of the Crest Street Community Council, Inc.

extending a freeway through the Crest Street Community with a major interchange in the midst of the community.[3] The proposed extension was a federal-aid highway project with 75% of the costs to be paid by federal funds. As proposed, extension of the freeway would destroy the Crest Street Community. The freeway right of way would displace the community church and park and more than half of the residents. The remaining residents would be isolated in fragments likely to be quickly consumed by commercial development.

For several years plans for the extension remained dormant; then, in 1976, NCDOT resumed active planning for the project. In March 1977, respondents retained the North Central Legal Assistance Program to represent them concerning NCDOT's planning and construction of the freeway and remedial efforts to mitigate the adverse impact of the project.[4] Respondents, during 1977 and 1978, expressed their opposition to construction of the freeway through the Crest Street Community, but petitioners proceeded with issuing a revised draft Environmental Impact Statement for the project.

After NCDOT issued this revised draft Environmental Impact Statement, respondents, in September 1978, filed an administrative complaint with the United States Department of Transportation (USDOT), pursuant to USDOT's Title VI regulations, 49 CFR 21 *et seq.* The

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3. The other petitioners are the governing board and official of the North Carolina Department of Transportation.

4. The North Central Legal Assistance Program, a nonprofit corporation which is funded by the Legal Services Corporation, provides legal representation to low-income persons.

complaint alleged that NCDOT's actions violated Title VI and sought rejection of NCDOT's revised Environmental Impact Statement and prohibition of further planning on the project until NCDOT complied with Title VI.[5]

USDOT investigated the administrative complaint, including a week-long field investigation, meetings with NCDOT's staff and with respondents, and the receipt of extensive documents from NCDOT and respondents. On February 20, 1980, USDOT notified the Secretary of NCDOT that USDOT had made a preliminary finding of reasonable cause that construction of the freeway as proposed in NCDOT's revised draft Environmental Impact Statement would constitute a prima facie violation of Title VI and USDOT Title VI regulations.[6]

Title VI requires that attempts be made to mediate a complaint before other enforcement measures can be instituted; "no such action [cutting off federal funding] shall be taken until the department or agency concerned

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5. The primary claims in the complaint were under Title VI. The complaint also challenged the project under the National Environmental Policy Act, 42 U.S.C. Section 4331, the Federal-Aid Highway Act, 23 U.S.C. Section 109 and Title VIII of the Civil Rights Act of 1968 (fair housing), 42 U.S.C. Section 3601.

6. The specific USDOT Title VI regulation, 49 C.F.R. Section 21.5(b)(3), provides:

"In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding persons from, denying them the benefits of, or subjecting them to discrimination under any program to which this regulation applies, on the grounds of race, color, or national origin, or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this part."

has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means." 42 U.S.C. Section 2000d-1.[7] Accordingly, USDOT urged NCDOT and respondents to attempt to mediate the issues raised by the administrative complaint. Prolonged, extensive negotiations followed between respondents and petitioners with involvement by representatives from USDOT, the Federal Highway Administration and other entities interested in the freeway. In February 1982, respondents, NCDOT and the City of Durham reached a preliminary agreement on resolution of the administrative complaint and negotiations continued toward a final agreement.

While negotiations continued, NCDOT moved, in August 1982, to dissolve an order enjoining construction of the freeway, entered in *ECOS, Inc., et al v. Brinegar, et al*, No. C-352-D-72 (M.D.N.C. Feb. 20, 1973).[8] Respondents and Willie Patterson, a Crest Street Community resident, moved to intervene in the *ECOS* action and filed a proposed complaint alleging the Title VI violations and other allegations raised in the administrative complaint.

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7. USDOT's Title VI regulations implement this requirement at 49 CFR Sections 21.11(d)(1) and 21.13(a).

8. In the *ECOS* action several organizations and individuals challenged construction of part of the freeway, including the portion proposed through the Crest Street Community, alleging violations of the Federal-Aid Highway Act, 24 U.S.C. Section 128, 138, 49 U.S.C. Section 1653 (f) (parkland preservation) and the National Environmental Policy Act of 1969, 42 U.S.C. Section 4332. NCDOT was enjoined from taking steps toward construction of this section of the freeway until NCDOT complied with these statutes.

While respondents' motion for intervention was pending, the parties agreed upon a Final Mitigation Plan and the City of Durham and NCDOT agreed upon a Municipal Agreement setting out the respective duties of NCDOT and the city in implementing the Mitigation Plan.

The Final Mitigation Plan recites that respondents agreed to withdraw their administrative complaint and support dissolution of the *ECOS* injunction in exchange for NCDOT's and the city's agreement to implement the Final Mitigation Plan.

On December 14, 1982 the district court entered a consent judgment in the *ECOS* action. The judgment dissolved the injunction, dismissed the action and dismissed, with prejudice, respondents' claims, conditional on NCDOT's implementing the Final Mitigation Plan.[9] The following day formal execution of the Final Mitigation Plan and Municipal Agreement took place at a public ceremony.

Under the terms of the Final Mitigation Plan, the respondents were accorded substantial relief. First, a new community site was developed in the same area as the existing community, allowing the residents to remain intact as

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9. Petitioners assert in their statement of the case that "Respondent Crest Street Community Council and the individual were not allowed to intervene." Petition at p. 4. This assertion is incorrect. The district court did not specifically rule on the intervention motion. The intervenors, though, became parties by virtue of the consent judgment, which both petitioners and respondents signed. The consent judgment adjudicated the claims between petitioners and respondents, dismissing with prejudice respondents' Title VI and other claims, conditioned upon petitioners' Implementation of the Final Mitigation Plan. Respondents' Appendix pages 1-5.

a community. Second, the petitioners moved the right-of-way for the freeway and modified the design of the interchange in the Crest Street Community so as to eliminate the taking of the community church and park. These modifications also provided available land for the new community site. In the new community housing, streets and recreational facilities are dramatically improved over the conditions in the old community. Much of the relief accorded to plaintiffs was provided by the petitioners. The North Carolina Department of Transportation released the City of Durham from its obligation to pay an estimated 2.75 million dollars for right-of-way costs for the Freeway, on the condition that the City use these and additional funds in the mitigation efforts. In addition, the North Carolina Department of Transportation provided direct benefits to the community, above and beyond regular relocation benefits, at an estimated cost of several million dollars.

Both the Final Mitigation Plan and the *ECOS* Consent Judgment specifically reserved respondents' claim for attorney's fees. Plaintiffs subsequently submitted to defendants a request for payment of attorney's fees, accompanied by the detailed listing of expenses and hours. This request was summarily denied by petitioners and respondents filed this action on November 30, 1983 to recover the requested attorney's fees and expenses.[10] The action came before the district court on cross motions for summary

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10. The petitioners' petition did not contain the statement of basis for federal jurisdiction in the court of first instance, required by Supreme Court Rule 21(1). The district court had jurisdiction of this action pursuant to 28 U.S.C. Section 1331 (federal question).

judgment.[11] On November 29, 1984 the district court granted petitioners' motion and dismissed the action. 598 F. Supp. 258 (M.D.N.C. 1984). The district court noted that there was no controlling Supreme Court or Fourth Circuit case on the issue, that the other circuits had divided on the issue, and that the issue was "difficult." *Id.*, at 266-7. The district court denied respondents' claim for fees for the Title VI federal administrative proceeding because the court concluded that Section 1988 did not authorize fees for such proceedings. The district court also denied respondents' claim for fees for the *ECOS* action because the court concluded that respondents were not prevailing parties in that litigation.[12]

Respondents appealed and while the case was pending before the Court of Appeals, this Court issued its decision in *Webb*. The Court of Appeals, applying the *Webb* decision, found that respondents' claim for attorneys fees was explicitly authorized by Section 1988 and the court remanded the action to the district court for a determination of the amount of the attorney's fees. 769 F.2d 1025 (4th Cir. 1985). The unanimous Court of Appeals opinion

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11. Petitioners filed a motion to dismiss, which the district court treated as a motion for summary judgment.

12. The district court reached this conclusion notwithstanding that petitioners had never contended that respondents were not prevailing parties in the *ECOS* action. The petitioners' motion to dismiss raised only the following defenses: lack of jurisdiction; Eleventh Amendment immunity; failure to state a claim; lack of standing; and failure to exhaust administrative remedies. Respondents' Appendix, pp. 7-8.

was authored by Chief Judge Winter and the panel included Judges appointed in each of the last three decades.[13]

The petitioners applied to the Court of Appeals for a stay of the mandate pending their petition for certiorari to this Court. The Court of Appeals denied the motion for a stay and issued the mandate. Respondents' Appendix, p. 3. The case is currently before the district court for a determination of the amount of the fees.

SUMMARY OF REASONS FOR DENYING THE WRIT

Petitioners request a writ of certiorari on two grounds. First, they contend that the decision of the Court of Appeals is in conflict with the recent *Webb* decision of this Court, *Webb v. Board of Education of Dyer County,* 471 U. S. —, 85 L.Ed.2d 233, 105 S.Ct. 1923 (1985). As will be shown below, however, the Court of Appeals' decision is entirely consistent with this Court's ruling in the *Webb* case and is in fact strongly supported by *Webb*. Second, petitioners, citing a number of cases dealing with the application of Section 1988 to administrative proceedings, assert that this Court should resolve the conflict in these cases. It will be shown below that, in fact, the *Webb* decision effectively resolved the conflict among the different decisions issued prior to *Webb* and there is no conflict among the subsequent decisions applying *Webb* to administrative proceedings. In addition, there has not been sufficient time for the lower courts to apply *Webb* and thus the issue of the application of Section 1988 to administrative proceedings is not yet ripe for further consideration by this Court.

13. Chief Judge Harrison L. Winter, appointed June 24, 1966; Judge H. Emory Widener, Jr., appointed October 17, 1972; and Robert F. Chapman, appointed October 2, 1981.

ARGUMENT

I. The Court of Appeals Correctly Applied the Webb Decision in this Case.

The *Webb* case was the third major Supreme Court case delineating the circumstances under which prevailing civil rights parties can recover attorney's fees for representation in administrative proceedings, the two previous cases being *New York Gaslight Club, Inc. v. Carey,* 447 U.S. 54, 100 S.Ct. 2024, 64 L.Ed. 2d 723 (1980) and *Smith v. Robinson,* 468 U.S. —, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984). In all three of these cases this Court has applied the relevant statutory language as it was enacted by Congress and has rejected attempts to either expand or contract the coverage of the statute. In the instant case the Court of Appeals correctly followed this same approach and applied the statutory language of Section 1988 in determining that respondents are entitled to recover their attorney's fees.

In the first Supreme Court case, *Carey,* a prevailing plaintiff under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e *et seq.,* sought attorney's fees for representation in a state administrative proceeding, which was established pursuant to Title VII. The attorney's fee provision for Title VII, Section 706(k), upon which Section 1988 was closely patterned, has the exact same lan-

guage of "any action or proceeding."[14] The defendant contended that the plaintiff could recover attorney's fees only for representation in court litigation and not for representation in an administrative proceeding, arguing that the word "proceedings" in Section 706(k) should be limited to court proceedings. This Court rejected that argument, stating:

> The words of Section 706(k) leave little doubt that fee awards are authorized for legal work done in "proceedings" other than court actions. Congress' use of the broadly inclusive disjunctive phrase "action or proceeding" indicates an intent to subject the losing party to an award of attorney's fees and costs that included expenses incurred for administrative proceedings.

100 S.Ct. at 2029.

In *Smith,* the second major Supreme Court case, a prevailing plaintiff sought attorney's fees under Section 1988 for state administrative proceedings pursuant to the Education of the Handicapped Act (EHA), 20 U.S.C. Section 1400 *et seq.* The state administrative proceeding in question was mandatory before a federal court action could be initiated. However, the proceedings were mandated by EHA, a non-fee statute, and not by one of the statutes listed in Section 1988. This Court again applied the attorney's fee provision literally, denying fees for the EHA proceeding because such proceedings were not proceedings to enforce one of the statutes ennumerated in Section 1988.

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14. Section 706(k) provides:

In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs. 42 U.S.C. Section 2000e-5(k).

Most recently, in the *Webb* case, this Court again applied the attorney's fee provision of Section 1988 as written and rejected an attempt to construe the statute in a manner contrary to its actual language. In *Webb* the plaintiff sought to recover attorneys fees for a state administrative proceeding that was a precursor to a Section 1983 federal court action. This Court rejected the claim, finding, as it did in *Smith,* that the state administrative action was not a proceeding to enforce one of the statutes enumerated in Section 1988. The Court concluded that fees for work performed in such administrative proceedings would be allowed only if the work "was both useful and of a type ordinarily necessary to advance the . . . litigation" of an action to enforce one of the statutes enumerated in Section 1988. 105 S.Ct. at 1925. In rejecting the plaintiff's attempt to expand the coverage of Section 1988 beyond its actual language, this Court also declined to adopt the defendant's argument to reduce the coverage of the statutory language of Section 1988. Defendants in *Webb,* like the *Carey* defendants, argued that the word "proceedings" in Section 1988 did not encompass administrative proceedings.[15] If the Court had adopted this limiting interpretation of the statute it would have easily disposed of the plaintiff's claim. The Court instead continued the approach exhibited in the *Carey* and *Smith* cases and applied the statute as it was written.[16]

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15. *Webb,* 103 S. Ct. at 1931. (Brennan, J., concurring in part and dissenting in part).

16. This Court has previously noted that generally the actual language of the statute should be followed: "[a]bsent a clearly expressed legislative intention to the contrary, [the]

(Continued on following page)

The Court of Appeals in the instant case followed this same approach for applying Section 1988. Section 1988, in pertinent part, provides:

> In any action or proceeding to enforce the provisions of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The Court of Appeals found: "that the wording of Section 1988 explicitly covers plaintiffs' claim: They were 'prevailing parties' in a 'proceeding to enforce . . . title VI of the Civil Rights Act of 1964.'" 769 F.2d at —; Petitioners' Appendix at 8. Petitioners nevertheless contend that the Court of Appeals decision is inconsistent with *Webb* because: "Although *Webb* does not construe the language of Section 1988 to mean administrative proceedings were not intended, it does appear to construe the legislative history as intending court actions rather than administrative actions . . . ." Petition at p. 8. This Court in *Webb* found that the legislative history of Section 1988 did not provide justification to expand the coverage of

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(Continued from previous page)

language [of] the statute must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 106 S.Ct. 2051, 64 L.Ed.2d 766 (1980), at 108. Regarding the issue of when attorney's fees are to be awarded, the Court has suggested that special deference be given to the statutory language enacted by Congress: "it is apparent that the circumstances under which attorney's fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." (footnote omitted) *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240, at 240, 95 S. Ct. 1612, 44 L.Ed.2d 141 (1975), at 262.

Section 1988 to administrative proceedings not specifically provided for in the statute. This case presents a different issue. Petitioners seek to exclude from the coverage of Section 1988 proceedings that *are* specifically provided for in the statute. Moreover, as the Court of Appeals below found, the legislative history of Section 1988 supports, rather than argues against, awarding attorney's fees to parties such as respondents, who have prevailed in Title VI federal administrative proceedings.[17]

In sum, the holding and the analytical approach of the Court of Appeals are entirely consistent with, if not mandated by, this Court's *Webb* decision.

II. The Webb Decision Resolved the Conflict in Pre-Webb Cases and There is No Conflict in Post-Webb Decisions on the Application of Section 1988 to Administrative Proceedings.

Petitioners cite numerous cases on the issue of the application of Section 1988 to administrative proceedings and ask this Court to grant certiorari to resolve the conflicts in these cases. The *Webb* decision, however, has already effectively resolved the conflicts. The majority of the pre-*Webb* cases cited are explicitly covered by the *Webb* ruling and in the remaining pre-*Webb* cases the rea-

---

17. The court concluded:

> Certainly there is no affirmative indication that Congress meant to nullify the term "proceeding" that it used in Section 1988. To the contrary, we believe that the expressed purposes "to remedy anomalous gaps in our civil rights laws . . . and to achieve consistency in our civil rights laws," Senate Report, supra note 13, at 1, the explicit references to Title VII, *id*, at 2, 3, 4, and the renewed instruction to "the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights laws," *id* at 3, all support our conclusion. 769 F.2d at —; Petitioners' Appendix at 13.

soning of the *Webb* opinion settles the conflict. Regarding the few post-*Webb* decisions, there is no conflict at all in the decisions of the various courts in their application of *Webb* to administrative proceedings.

Most of the decisions cited by petitioners are pre-*Webb* cases which involve state proceedings which were not proceedings to enforce one of the statutes listed in Section 1988: *Blow v. Lascaris,* 668 F.2d 670 (2nd Cir. 1980), *cert. denied* 459 U.S. 914, 103 S.Ct. 225, 74 L.Ed.2d 179 (1982) (state administrative medicaid proceeding); *Horacek v. Thone,* 710 F.2d 496 (8th Cir. 1983) (state administrative proceeding established pursuant to a consent decree); *Redd v. Lambert,* 674 F.2d 1032 (5th Cir. 1982) (state court proceeding pursuant to the Tax Injunction Act); *Garcia v. Ingram,* 729 F.2d 691 (10th Cir. 1984) (Title XX state administrative proceeding); *Ciechon v. City of Chicago,* 686 F.2d 511 (7th Cir. 1982) (municipal administrative proceeding preceding Section 1983 action); and *Lampher v. Zagel,* 755 F.2d 99 (7th Cir. 1985) (state court proceeding preceding Section 1983 action). These cases presented the very issue decided by this Court in *Webb* and fees for these proceedings are not authorized by Section 1988, except for time necessary to advance a related action or proceeding that is covered by Section 1988. *Webb,* 105 S.Ct. at 1925. The remaining two pre-*Webb* cases cited by petitioner involve Title VI federal administrative proceedings; *Latino Project, Inc. v. City of Camden,* 701 F.2d 262 (3rd Cir. 1983) (fees denied) and *N.A.A.C.P. v. Wilmington Medical Center, Inc.,* 689 F.2d 1161 (3rd Cir. 1982), *cert. denied,* 460 U.S. 1052, 103 S.Ct. 1499, 75 L.Ed2d 930 (1980) (fees allowed). While *Webb* did not specifically rule on the issue of whether attorney's

fees can be recovered for Title VI federal administrative proceedings, the reasoning of the *Webb* opinion undercuts the *Latino* decision and strongly supports the *N.A.A.C.P.* decision and the decision of the Court of Appeals in this case. The *Latino* court concluded that the word "proceeding" in Section 1988 referred only to court actions. 701 F.2d at 264. As noted above, this same argument was made to this Court in the *Webb* case and the Court declined to adopt it. In addition the approach, continued in *Webb,* of applying attorney's fees statutes as written supports the *N.A.A.C.P.* decision and the decision of the Court of Appeals below in that Section 1988 specifically provides for attorney's fees for "proceedings . . . to enforce . . . title VI . . . ."

In decisions handed down subsequent to *Webb* there is no conflict among the ruling regarding the application of Section 1988 to administrative proceedings: *Delaware Valley Citizens' Council v. Pennsylvania,* 762 F.2d 272 (3rd Cir. 1985) (fees allowed for work in administrative proceeding where work was useful and necessary to advance litigation under a fee statute); *Kuhns v. City of Commerce City,* 618 F. Supp. 1475 (D. Colo. 1985) (fees refused for state administrative proceeding not part of an action to enforce a statute ennumerated in Section 1988); and *Bennett v. Central Telephone Company of Illinois,* No. 79 C 5000, — F.Supp. —, (N.D. Ill. Sept. 30, 1985) (fees allowed for work in administrative action, where work was useful and necessary to advance Title VII claim in different action against same defendant). Thus, there simply is no conflict that requires resolution by this Court.

Even assuming, *arguendo,* that some conflict is unresolved regarding the application of Section 1988 to ad-

ministrative proceedings, such conflict would not justify the granting of certiorari in this case. As shown by the small number of cases applying *Webb* to this issue, there has not been sufficient time for the lower courts to apply *Webb* and review of the issue now by this Court would be premature and perhaps unnecessary.[18]

CONCLUSION

For the reasons explained above, respondents request that the Court deny the petition for writ of certiorari or, in the alternative, that the Court summarily affirm the decision below of the Court of Appeals.

Respectfully submitted,

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18. Petitioners also assert, without discussion of its application to their petition, that Section 1988 does not create an independent cause of action to recover attorney's fees. Petition, p. 8. In the case at bar there was, as the Court of Appeals noted, a court action, if one is needed to trigger Section 1988. 769 F.2d at —; Petitioners' Appendix at 20. Moreover, as both the district court and the Court of Appeals concluded such a court action is in fact not required. *id;* 598 F. Supp. at 262. In any event, petitioners' assertion provides no support for their petition.

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA
DURHAM DIVISION

No. C-352-D-72

ECOS, INC.; DREW DIEHL; ASSOCIATED STUDENTS OF DUKE UNIVERSITY; STEVE SCHEWEL and HENRY BECK, Members of Associated Students of Duke University; and JOHN ROBERTSON,

Plaintiffs

CREST STREET COMMUNITY COUNCIL, INC. and WILLIE PATTERSON,

Applicants for Intervention

v.

CLAUDE S. BRINEGAR, Secretary of United States Department of Transportation; T. J. MORAWSKI, Division Engineer, Federal Highway Administration; McLAUCHLIN D. FAIRCLOTH, Commissioner, North Carolina State Commission; W. F. CADDELL, JR., Planning and Research Engineer, North Carolina State Highway Commission; and NELLO TEER COMPANY, A Corporation,

Defendants.

CONSENT JUDGMENT

(Filed December 4, 1982)

1. Plaintiffs brought this action on December 18, 1971, seeking an injunction prohibiting further construction of the East-West Expressway in Durham, North Carolina, on grounds of alleged violations of the require-

ments for a public hearing under 23 U.S.C. § 128, as amended, of alleged failure to comply with Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. § 1653(f), and Section 138 of the Federal-Aid to Highway Act of 1968, 23 U.S.C. § 138 with respect to the use of lands protected thereunder, and of alleged failure to comply with Section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(a)(C).

2. The Durham East-West Expressway, if completed as proposed, will be a multi-lane controlled access highway which will extend from an interchange with existing Interstate 85 west of Durham easterly and southerly through the City to an interchange with the North-South Expressway and then northerly by way of the U.S.-70 Connector to an interchange with existing U.S. Highway 70 east of Durham, a total distance of 9.2 miles.

3. At the time of the institution of this action, a section of the expressway 1.7 miles in length lying between Chapel Hill Street and Alston Avenue had been completed and was open to traffic; another section 1.9 miles in length, lying between Alston Avenue and the North-South Expressway was under construction and almost complete; and another section 0.8 miles in length, lying between Chapel Hill Street and Erwin Road, was under construction by the defendant Nello L. Teer Company pursuant to a contract executed October 10, 1972.

4. On February 20, 1973, following a hearing on plaintiffs' motion for a preliminary injunction, the court denied relief as to the 0.8 mile section under construction but restrained and enjoined the defendants from taking any steps leading towards construction of the segment

lying between Erwin Road and the interchange at I-85 until compliance in full with the statutes alleged to have been violated and implementing regulations.

5. On November 8, 1973, the plaintiffs and the defendants, by consent judgment, settled their controversy as to the 0.8 mile segment under construction.

6. The North Carolina Department of Transportation, with federal assistance, now intends to construct a section of the expressway lying between Erwin Road and U. S. Highway 15-501.

7. The State defendants have filed a motion seeking dissolution of the injunction and dismissal of the action. The attorneys for the plaintiffs have filed responses to the State defendants' motion for dissolution of the injunction. Crest Street Community Council, Inc. and Willie Patterson, applicants for intervention, have filed a motion for intervention as plaintiffs in the action either as of right pursuant to Rule 24(a)(2) or by permission pursuant to Rule 24(b)(2).

8. The State defendants and the applicants for intervention have resolved the things and matters in controversy between them by agreement adopted by the North Carolina Board of Transportation on November 19, 1982. The plaintiffs and the applicants for intervention do not or no longer oppose the State defendants' motion to dissolve the injunction and do not wish to prosecute this action any further except that the applicants for intervention explicitly reserve the right to pursue all claims in their application for intervention in the event said agreement is not fully implemented, and in addition, reserve their claim for attorney fees against the

State defendants and the North Carolina Department of Transportation and the plaintiffs reserve their right to pursue all claims relating to the section of the expressway proposed to be constructed between U.S. Highway 15-501 and Interstate 85.

NOW, THEREFORE, without further proceedings, and upon consent of the parties, it is hereby ORDERED, ADJUDGED and DECREED:

1. That the injunction presently in force in this action is dissolved and is of no further force or effect;

2. All claims in this action are dismissed, and this dismissal is with prejudice for all claims except those explicitly reserved in Paragraph Eight above by applicants for intervention and plaintiffs.

3. That the plaintiffs and the defendants shall bear their own costs, including their own attorney fees.

This the 14 day of December, 1982.

/s/ Eugene A. Gordon
UNITED STATES DISTRICT
COURT JUDGE

WE CONSENT:

SMITH, PATTERSON, FOLLIN, CURTIS,
JAMES & HARKAVY

By /s/ Michael K. Curtis
Attorney for Plaintiffs

/s/ Wilbur Gulley
Attorney for Plaintiff Steve Schewel

A True Copy

Attest:

Carman J. Stuart, Clerk
Clery Shepherd
Deputy Clerk

NORTH CENTRAL LEGAL
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Attorney for the Defendant Nello Teer Company

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1008

(Filed September 9, 1985)

Crest Street Community Council, Inc.,
et al,

Appellants,

versus

North Carolina Department of
Transportation, et al,

Appellees.

Appeal from the United States District Court for the Middle District of North Carolina, at Durham. Hiram H. Ward, District Judge.

Upon consideration of the motion of the appellees for a stay of mandate pending application to the Supreme Court of the United States for a writ of certiorari;

IT IS ORDERED that the recall and stay of the mandate is hereby denied.

For the Court—By Direction
JOHN M. GREACEN
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
NORTH CALONINA
DURHAM DIVISION

File No. C-83-1239-D

CREST STREET COMMUNITY COUNCIL, INC.
et al,

Plaintiffs,

v.

NORTH CARLOINA DEPARTMENT OF TRANSPORTATION, NORTH CAROLINA BOARD OF TRANSPORTATION, and WILLIAM R. ROBERSON, as Secretary of the North Carolina Department of Transportation and Chairman of the North Carolina Board of Transportation,

Defendants.

DEFENDANTS' MOTION
TO DISMISS THE ACTION

(Filed August 8, 1984)

The defendants North Carolina Department of Transportation, North Carolina Board of Transportation and William R. Roberson, as Secretary of the North Carolina Department of Transportation and Chairman of the North Carolina Board of Transportation, by and through their attorney, respectfully move the Court pursuant to Rules 12(b) and 12(c) of the Rules of Civil Procedure for an order dismissing this action on the following grounds:

(1) The Court lacks jurisdiction over the subject matter of the action and over the person of the defendants.

(2) In essence this is an action against the State of North Carolina, which has not consented to suit nor

otherwise waived its sovereign immunity or its immunity from suit under the Eleventh Amendment to the Constitution of the United States.

(3) The Complaint fails to state a claim upon which relief can be granted.

(4) The plaintiffs lack standing to bring and maintain this action.

(5) The plaintiffs have failed to pursue and exhaust their administrative remedies.

The grounds for this motion are more fully set forth in the defendants' accompanying brief.

This the 8th day of August, 1984.

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Supreme Court, U.S.
FILED
APR 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-767

In The
Supreme Court of the United States
October Term, 1986

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, ET AL,

Petitioners,

vs.

CREST STREET COMMUNITY COUNCIL, INC., ET AL,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 13, 1985
CERTIORARI GRANTED JANUARY 13, 1986

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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RELEVANT DOCKET ENTRIES

November 30, 1983	Plaintiffs filed Complaint in *Crest Street Community Council, Inc. v. North Carolina Department of Transportation, et al.*, No. C-83-1239-D, (M.D. N.C.).
December 22, 1983	Defendants filed Answer to Complaint.
June 22, 1984	Plaintiffs filed Amendment to Complaint (Allowed by June 20, 1984 Order).
July 3, 1984	Defendants filed Answer to Amendment to Complaint.
August 8, 1984	Defendants filed Motion to Dismiss the Action with supporting brief.
August 8, 1984	Plaintiffs filed Motion for Summary Judgment with supporting brief and affidavits.
August 30, 1984	Defendants filed Response to Plaintiffs' Motion for Summary Judgment with supporting brief, affidavits, and exhibits.
August 31, 1984	Plaintiffs filed Response to Defendants' Motion to Dismiss with supporting brief.
November 1, 1984	Hearing held on Plaintiffs' Motion for Summary Judgment and Defendants' Motion to Dismiss. The Court took the matter under consideration.
November 29, 1984	Court filed Memorandum Opinion and Order and Judgment was entered treating Defendants' Motion to Dismiss as Summary Judgment Motion, denying Plaintiffs' Motion for Summary Judgment, and dismissing the action.

December 24, 1984	Plaintiffs filed Notice of Appeal to the Fourth Circuit Court of Appeals from the judgment of November 29, 1984.
June 7, 1985	Argument before the Fourth Circuit Court of Appeals.
August 15, 1985	Opinion and judgment of Fourth Circuit Court of Appeals entered reversing the judgment of the district court and remanding the case for determition of a reasonable attorneys' fee.
September 9, 1985	Appellees' motion for a stay of mandate pending application to the Supreme Court of the United States for a writ of certiorari is denied by the Fourth Circuit Court of Appeals.
November 13, 1985	Petition for Writ of Certiorari to the Fourth Circuit Court of Appeals to review the August 15, 1985 judgment is filed in the Supreme Court of the United States.
January 13, 1986	Petition for a Writ of Certiorari is granted.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

File #C-83-1239-D

CREST STREET COMMUNITY COUNCIL, INC.,

Plaintiff,

V.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, NORTH CAROLINA BOARD OF TRANSPORTATION, and WILLIAM R. ROBERSON, as Secretary of the North Carolina Department of Transportation and Chairman of the North Carolina Board of Transportation,

Defendants.

COMPLAINT

(Filed 30 November 1983)

INTRODUCTION

1. This is an action to recover plaintiff's attorneys' fees under the Civil Rights Attorneys Fees Act, 42 U.S.C. § 1988, for legal representation which enforced plaintiff's civil rights in connection with the defendants' planning and construction of the Durham East/West Expressway.

PARTIES

2. The Crest Street Community Council, Inc. is a not for profit corporation organized under the laws of the State of North Carolina and comprised of the members of the Crest Street Community of Durham, North Carolina. The Corporation's office is located in Durham, North Carolina, and all of its members reside in Durham, North Carolina.

3. The North Carolina Department of Transportation is an agency of the State of North Carolina and is responsible for determining the selection, location and design of major highways in North Carolina, including the Durham East/West Expressway, and carrying out the construction of such highways.

4. The North Carolina Board of Transportation is the governing body of the North Carolina Department of Transportation.

5. William R. Roberson is Secretary of the North Carolina Department of Transportation and is Chairman of the North Carolina Board of Transportation.

JURISDICTION

6. The Court has jurisdiction of the parties and subject matter of this action pursuant to 42 U.S.C. § 1331, § 1337 and §§ 1343(a) (3) and (4).

FACTS

7. In late 1976, the North Carolina Department of Transportation began proceeding with administrative actions to initiate construction of the Durham East/West Expressway through the Crest Street Community, a stable, cohesive, black neighborhood in western Durham. North Carolina.

8. In the Crest Street Community, strong family ties among households and stability in residency of the households sustain a close, supportive community. An anthropological study of the community found that over half of the households in the community have relatives in other households and a majority of the residents have lived in

the community for more than 20 years and many have lived there all their lives. The community is centered around the New Bethel Baptist Church, which recently celebrated its centennial anniversary.

9. The expressway location and design proposed by the North Carolina Department of Transportation would have destroyed the Crest Street Community. The expressway route was planned to go through the middle of the Crest Street Community and a major interchange was proposed to be placed on the top of the Crest Street Community. The combined effect of the regular right-of-way and this interchange would have been to displace more than half of the community, including the community church, and to leave the remaining residents isolated in undesirable pockets which would be subject to intense commercialization pressure. Furthermore, defendants' plan to raze the Crest Street Community discouraged private and public investment in the neighborhood and was thus causing the neighborhood to deteriorate and to be denied public services.

10. In March 1977, plaintiff retained the North Central Legal Assistance Program as its attorneys to represent it concerning the proposed extension of the expressway through the Crest Street Community.

11. During 1977 and 1978, plaintiff communicated to defendants its opposition to construction of the expressway through the Crest Street Community and requested that the defendants stop their efforts to extend the expressway through the plaintiff's community. Plaintiff also requested that the defendants provide current traffic data to plaintiff so that plaintiff's traffic engineering consultant

could prepare alternatives to the expressway. Notwithstanding these requests, defendants maintained that further data was not required; defendants proceeded with recommending to local governments that the expressway should be extended; and defendants proceeded with issuing a revised draft environmental impact statement for construction of the expressway through the Crest Street Community.

12. The Durham East/West Expressway was and is a federal aid highway project with federal funds providing approximately seventy-five percent (75%) of the costs of the project.

13. In September 1978 plaintiff, under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and pursuant to the United States Department of Transportation (USDOT) Title VI procedures set out in 49 CFR 21, filed an administrative complaint with the United States Department of Transportation, stating that plaintiff's civil rights were being violated by the defendants' plans and efforts to construct an expressway through the Crest Street Community.

14. The USDOT Office of Civil Rights proceeded to investigate this administrative complaint. A field investigator was sent to the Raleigh-Durham area and spent a week meeting with plaintiff and defendants and investigating the complaint. Subsequent to this field investigation, the Office of Civil Rights requested various information and materials from the plaintiff and defendants. In February 1980, the USDOT Office of Civil Rights issued a preliminary finding that construction of the East/

West Expressway as proposed by defendants would violate plaintiff's rights under Title VI of the 1964 Civil Rights Act. The Office of Civil Rights also urged plaintiff and defendants to meet and seek conciliation of the issue before further administrative proceedings took place.

15. Subsequent to the issuance of the finding in February 1980 by the Office of Civil Rights, plaintiff and defendants met extensively and explored numerous alternatives to resolve the controversy between them. In February of 1982, plaintiff and defendants reached agreement on a preliminary concept to modify the expressway design and to provide plaintiff's members with substantial compensating housing and community programs, above and beyond normal relocation benefits, to mitigate the adverse impact of the expressway construction on the Crest Street Community. The effect of this agreement was to preserve and strengthen the Crest Street Community. In this agreement, plaintiff specifically asserted and reserved its rights to receive attorneys' fees.

16. In May 1982, defendant issued a final environmental impact statement for construction of the East/West Expressway and subsequently moved this Court to dissolve its injunction in *ECOS, et al. v. Brinegar, et al.*, (C-352-D-72), prohibiting further construction of the expressway. (The *ECOS* case was filed in 1972 by an environmental group and several individuals seeking an injunction to stop construction of a section of the expressway then under construction. This injunction was denied but defendants were enjoined from constructing any further sections of the expressway until specified statutes and regulations were complied with in full.) Plaintiff moved

for intervention in the *ECOS* case asserting, *inter alia,* that the expressway construction would violate its members' rights under Title VI of the Civil Rights Act of 1964. While this motion was pending, plaintiff and defendants reached final agreement on a settlement and mitigation plan and agreed with the other parties in the ECOS case to a consent judgment which dismissed the ECOS action. In both the final settlement and the consent judgment, plaintiff again specifically reserved its right to recovery attorneys' fees.

17. Under the terms of plaintiff's settlement with defendants, the plaintiff's members will receive substantial individual benefits beyond normal relocation benefits and plaintiff's community will be preserved and strengthened. The agreement includes the following provisions. First, defendants have modified the expressway design to reduce the number of households in the community that will be displaced and to prevent destruction of the community church. Also, defendants released the City of Durham from having to pay several million dollars toward the expressway right-of-way in exchange for the City's agreeing to assist defendants with construction of a new community for plaintiff's members. The new community will be built on the portion of the community not taken by the expressway and on several adjacent parcels of land. In plaintiff's present community the streets were narrow and were stip-paved or dirt and there were very few recreation facilities. In the new community full paved, curbed and guttered streets and sidewalks will be provided as well as substantial recreation facilities, including a baseball field, lighted basketball courts and a community center.

Regarding housing, community homeowners will be offered newly constructed homes in exchange for their current homes and community residents who were tenants will be offered low-cost home ownership or long-term rent subsidized housing in the new community. This beneficial settlement revitalizes plaintiff's community, mitigates plaintiff's members' hardships and is a direct result of the legal proceedings and actions for which plaintiff now seeks attorney's fees.

18. Plaintiff has presented defendant with a detailed statement of its expenses and attorneys' hours and defendant has refused to pay any expenses or attorneys' fees. A copy of these expenses and hours are attached hereto as Exhibit A.

CLAIM FOR RELIEF

19. Plaintiff's members secured their rights under Title VI of the Civil Rights Act of 1964 in connection with defendants' planning and construction of the Durham East/West Expressway and plaintiff is entitled to recover expenses and reasonable attorneys' fees for legal representation which vindicated these rights.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays for relief as follows:

A. That the defendants be ordered to pay plaintiff its expenses and reasonable attorneys' fees;

B. That the defendants be ordered to pay the costs of this action, including plaintiff's expenses and attorneys' fees for prosecuting this action; and

C. That the Court grant plaintiff such other relief as the Court finds to be just and proper.

This the 28th day of November, 1983.

NORTH CENTRAL LEGAL ASSISTANCE PROGRAM
Durham, North Carolina

Attorneys for Plaintiff

s/ By MICHAEL D. CALHOUN

s/ ALICE A. RATLIFF

STATEMENT OF HOURS AND EXPENSES

HOURS:

Attorney	1020.75
Staff Associate	90.00
Paralegal	104.00
Law Clerk	46.50

EXPENSES:

Long distant telephone calls	$327.50
Out of town travel	579.17
TOTAL	$906.67

EXPERTS:

Planning consultant:

Fee — $13,031.40 (249.5 hours)

Travel Expenses — 1,260.23

TOTAL $14,291.63

YEAR 1977

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
March 17	Ratliff	1	Conference planning
	Ray	1	
March 23	Ratliff	2	Planning and legal research
March 24	Ratliff	1	Legal research
March 29	Ratliff	1	Planning conference
	Calhoun	1	
	Ray	1	
April 7	Ratliff	1	Crest Street planning
April 7	Ratliff	2	Planning meeting with clients
April 12	Ratliff	2	Conference with clients
	Ray	2	
April 20	Ratliff	1	Investigation of Expressway plans
May 11	Ratliff	2	Conference with clients
May 22	Ray	½	Telephone conference with City engineering staff regarding Expressway plans
June 6	Ratliff	1¾	Monitoring NC DOT presentation to Durham City Council regarding interchange design
June 9	Ray	1½	Meeting with clients
	Ratliff	1½	
	Calhoun	1½	
June 27	Ratliff	2	Meeting with clients

YEAR 1977

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
June 30	Calhoun	½	Telephone conference with NC DOT
June 30	Ray	1½	Planning conference
	Calhoun	1½	
	Ratliff	1½	
July 5	Ratliff	2	Meeting with clients
July 7	Calhoun	6	Review of & analysis of NC DOT Expressway file
July 7	Ratliff	6	Review of NC DOT materials
July 19	Calhoun	8	Review of NC DOT materials
July 20	Calhoun	7	Review of NC DOT materials
July 20	Ratliff	1	Planning conference
	Calhoun	1	
July 21	Ratliff	1	Conference with anthropologist regarding Crest Street survey
July 26	Ratliff	8	Review of DOT file
July 28	Ratliff	2	Meeting with anthropologist regarding Crest Street survey
August 1	Ratliff	1½	Planning
August 1	Ratliff	1½	Meeting with clients
	Calhoun	1½	
August 4	Ratliff	2	Meeting with anthropologist regarding community survey

YEAR 1977

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
August 9	Ratliff	1	Meeting with anthropologist regarding community survey
August 15	Calhoun	1½	Meeting with clients
September 12	Ratliff	1½	Steering Committee meeting
September 19	Ratliff	1½	Steering Committee meeting
September 28	Ratliff	2	Meeting with anthropologist regarding community survey
	Calhoun	2	
September 29	Ratliff	2	Planning
October 4	Ratliff	2	Meeting with clients
October 18	Ratliff	2	Meeting with clients
October 27	Ratliff	6	Legal research regarding Relocation Assistance Act
October 28	Ratliff	2	Conference
	Calhoun	2	
November 3	Ratliff	8	Research regarding Civil Rights Act of 1964
November 11	Ratliff	2	Planning conference
	Calhoun	2	
November 14	Ratliff	1½	Meeting with clients
November 16	Ratliff	½	Correspondence with housing consultant

YEAR 1977

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
November 17	Ratliff	1½	Meeting with anthropologist regarding community survey
	Calhoun	1½	
November 18	Ratliff	1	Planning meeting
	Fox	1	
	Calhoun	1	
	Dickson (law student)	1	
November 18	Ratliff	2	Meeting with anthropologist regarding community survey
	Calhoun	2	
November 18	Calhoun	4½	Investigation regarding traffic data and correspondence with traffic engineering consultant
November 29	Ratliff	2	Meeting with clients
December 5	Calhoun	¼	Correspondence with traffic engineering consultant
December 8	Ratliff	3	Meeting with clients
December 12	Ratliff	1½	Monitoring NC DOT presentation to City Council
December 15	Ratliff	1	Monitoring NC DOT presentation to Durham City Council Committee of the Whole
December 18	Ratliff	¾	Planning Conference
	Calhoun	¾	
December 20	Ratliff	¼	Correspondence to NC DOT

YEAR 1978

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
January 5	Calhoun	8	Legal research NEPA and § 4-F
January 5	Ratliff	¼	Review of correspondence from NC DOT
January 6	Calhoun	7	Legal research NEPA and § 4-F
January 10	Calhoun	3	NC DOT hearing at New Bethel Baptist Church on Expressway
January 12	Calhoun	2	Monitoring NC DOT hearing on Expressway at McMannan Methodist Church
January 13	Ratliff	¼	Correspondence to NC DOT
January 13	Calhoun	7	Meeting and survey of Expressway site with traffic engineering consultant
January 20	Calhoun	¼	Correspondence to traffic engineering consultant
January 23	Ratliff	¼	Phone call with Richard Davis, NC DOT
January 26	Ratliff	1½	Meeting with anthropologist regarding community survey and study
January 27	Calhoun	½	Communication with traffic consultant
January 30	Ratliff	¾	Review of materials correspondence from NC DOT

YEAR 1978

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
January 30	Ratliff	1½	Meeting with clients
February 6	Ratliff	4	Meeting with anthropologist regarding community survey and study
	Calhoun	4	
February 9	Calhoun	¼	Call to NC DOT
February 14	Calhoun	½	Correspondence with traffic engineering consultant
February 14	Ratliff	1½	Meeting with anthropologist regarding community survey and study
February 15	Ratliff	2	Meeting with anthropologist regarding community survey and study
February 21	Calhoun	¼	Communication with traffic engineering consultant
February 23	Calhoun	1¾	Legal research and correspondence to NC DOT
February 24	Ratliff	1	Meeting with clients
February 27	Ratliff	2	Meeting with clients
	Calhoun	2	
February 28	Ratliff	3	Planning meeting
	Calhoun	3	
March 1	Calhoun	2½	Investigation of work force and shift time of West Durham employers
March 2	Calhoun	¾	Investigation of availability of relocation

YEAR 1978

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
March 2	Ratliff	2	Meeting with anthropologist regarding community survey and study
March 9	Ratliff	¼	Review of letter from NC DOT
March 21	Ratliff	2	Research regarding availability of federal housing assistance
March 24	Calhoun	1¼	Monitoring NC DOT presentation to Durham City Council
March 29	Ratliff	1	Meeting with clients
March 30	Ratliff	1	Meeting with clients
March 30	Ratliff	1½	Meeting with clients
April 5	Ratliff	1	Planning meeting
	Calhoun	1	
April 6	Ratliff	2	Meeting investigating feasibility of relocating community
April 12	Ratliff	1½	Meeting with anthropologist regarding community survey and study
	Calhoun	1½	
April 13	Ratliff	1½	Meeting with clients
	Calhoun	1½	
April 19	Ratliff	8	Planning meeting; legal and factual research
	Calhoun	8	
April 24	Ratliff	1½	Meeting with clients
April 27	Ratliff	1	Monitoring NC DOT presentation to City Council

YEAR 1978

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
May 1	Calhoun	1½	Monitoring NC DOT presentation to City Council
May 1	Calhoun	¾	Correspondence with traffic engineering consultant
May 5	Calhoun	2½	Meeting with clients
	Ratliff	2½	
May 8	Calhoun	¼	Call to NC DOT
May 11	Ratliff	1	Meeting with anthropologist regarding community survey and study
May 11	Ratliff	2	Crest Street Steering Com-
	Calhoun	2	mittee meeting
May 31	Ratliff	¼	Phone conference with traffic engineering consultant
June 3	Ratliff	3	Meeting with clients
	Calhoun	3	
June 14	Ratliff	1½	Meeting with clients
June 17	Ratliff	1	Meeting with clients
June 20	Calhoun	1¾	Review of EPA document regarding air quality requirements
June 20	Calhoun	¾	Phone conference with EPA officials regarding air quality requirements

YEAR 1978

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
June 21	Calhoun	1¾	NC DOT Highway Improvement Plan hearing
June 22	Ratliff	2	Meeting with clients
	Calhoun	2	
July 6	Ratliff	2	Crest Street Steering Com-
	Calhoun	2	mittee meeting
July 12	Ratliff	1	Investigation of traffic data
July 13	Ratliff	1½	Meeting with clients
July 14	Ratliff	2	Investigation of feasibility of relocating community
July 20	Calhoun	1½	Meeting with clients
August 1	Calhoun	¼	Phone conference with traffic engineering consultant
August 1	Calhoun	¼	Call to NC DOT
August 2	Calhoun	1¾	Meeting with clients
August 4	Ratliff	1	Meeting with anthropologist regarding community survey and study
August 4	Calhoun	2	Preparation of resource materials and consultation with traffic consultant
August 7	Calhoun	¼	Call to NC DOT
August 14	Calhoun	4	Meeting with NC DOT planners
August 15	Calhoun	3	Review of materials in NC DOT file
August 16	Calhoun	3½	Meeting with NC DOT Planners

YEAR 1978

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
August 17	Ratliff	1	Meeting with clients
August 18	Calhoun	¼	Called to NC DOT planners
August 20	Ratliff	¾	Meeting with clients
August 23	Calhoun	¾	Investigation of expressway alternatives
August 23	Calhoun	¼	Correspondence with NC DOT
August 25	Calhoun	¼	Call to traffic engineering consultant
August 28	Calhoun	1½	Meeting with clients
August 30	Calhoun	3½	Preparation of resource materials and correspondence with traffic engineering consultant
August 31	Calhoun	¼	Phone conference with NC Federal Highway Administrator
September 1	Calhoun	3	Monitor NC DOT Planning Board Meeting
September 5	Ratliff	1	Legal and factual research
September 6	Ratliff	2	Conference with clients
September 7	Calhoun	¼	Correspondence with Federal Highway Administrator
September 7	Ratliff	3½	Conference with clients and meeting with NC Federal Highway Administrator
	Calhoun	3½	
September 7	Calhoun	½	Correspondence with traffic engineering consultant

YEAR 1978

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
September 7	Calhoun	¼	Correspondence with Secretary, U.S. Department of Transportation
September 7	Calhoun	¼	Correspondence with UMTA Administrator
September 7	Calhoun	¼	Correspondence with Region IV Federal Highway Administrator
September 8	Calhoun	3	Monitoring NC DOT meeting
September 11	Calhoun	¼	Review of correspondence from NC DOT
September 11	Calhoun	½	Communication with traffic engineering consultant
September 12	Calhoun	¼	Call from NC DOT planner
September 14	Calhoun	¼	Review of correspondence from Federal Highway Administrator
September 14	Ratliff	1½	Conference with clients
September 15	Calhoun	¼	Call to NC DOT planner
September 18	Calhoun	1¼	Correspondence with Office of Civil Rights
September 18	Calhoun	¼	Call to NC DOT planner
September 19	Calhoun	½	Review of correspondence from NC DOT
September 21	Calhoun	¼	Call to NC Federal Highway Administrator
September 21	Calhoun	¼	Call to NC DOT

YEAR 1978

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
September 21	Calhoun	4½	Legal research regarding NC DOT Action Plan
September 23	Calhoun	¼	Correspondence with NC DOT
September 26	Calhoun	½	Review of correspondence from Federal Highway Administration
September 27	Calhoun	½	Correspondence with NC DOT
September 28	Calhoun	2½	Consultation with traffic engineering consultant
October 1	Ratliff	¼	Phone consultation with planning consultant
October 2	Calhoun	¼	Phone conference with traffic engineering consultant
October 3	Calhoun	1¼	Research and correspondence with Federal Highway Administrator
October 9	Calhoun	3½	Meeting with NC DOT planners
October 10	Calhoun	3	Monitor NC DOT Planning Board Meeting
October 12	Calhoun	¼	Review of correspondence from Federal Highway Administration
October 13	Calhoun	½	Review of NC DOT correspondence and materials
October 19	Calhoun	¼	Correspondence with traffic engineering consultant

YEAR 1978

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
October 19	Calhoun	½	Correspondence with NC DOT
October 19	Calhoun	¼	Call to NC DOT Planners
October 19	Calhoun	4	Compilation of materials for civil rights investigator and letter to civil rights investigator
October 20	Calhoun	¼	Call to NC DOT
October 23	Calhoun	8	Conference and orientation with William Davis, US DOT Civil Rights Investigator
October 24	Calhoun	1	Meeting with Lt. Pendergrass of Durham Police and US DOT investigator
October 24	Calhoun	7	Site investigation with William Davis
October 24	Ratliff Calhoun	1½ 1½	Meeting with William Davis and local representatives
October 24	Ratliff Calhoun	1½ 1½	Meeting with William Davis and anthropologist consultant
October 25	Calhoun	2½	Meeting with DOT officials and US DOT investigator
October 25	Calhoun	4	Conference with US DOT investigator
October 26	Calhoun Ratliff	2½ 2½	Meeting with US DOT investigator and clients

YEAR 1978

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
October 26	Calhoun	1½	Meeting with Durham
	Ratliff	1½	Housing Authority Director and US DOT Civil Rights Investigator
October 26	Calhoun	1¾	Meeting with City planning officials and US DOT investigator
October 27	Calhoun	2	Summary conference with William Davis
October 30	Calhoun	7	Review and analysis of NC DOT Expressway materials
October 31	Calhoun	¼	Call to Triangle J Council of Governments regarding Expressway A-95 Review
October 31	Calhoun	8	Review and analysis of NC DOT Expressway materials
November 1	Calhoun	8	Review and analysis of NC DOT Expressway materials
November 2	Calhoun	8	Review and analysis of NC DOT Expressway materials
November 3	Calhoun	6	Review and analysis of NC DOT Expressway materials
November 3	Calhoun	½	Correspondence with traffic engineering consultant

YEAR 1978

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
November 6	Calhoun	¼	Phone call to Office of Civil Rights
November 9	Calhoun	¼	Phone call to US DOT Office of Civil Rights
November 10	Calhoun	¼	Correspondence with NC DOT
November 10	Calhoun	¼	Correspondence with NC DOT Civil Rights Coordinator
November 25	Calhoun	1	Correspondence with traffic engineering consultant
November 27	Calhoun	1	Review of NC DOT correspondence
November 29	Calhoun	½	Review of correspondence and materials from NC DOT
November 30	Calhoun	4½	Monitoring NC DOT
	Ratliff	4½	Expressway hearing
December 4	Calhoun	¼	Phone conference with traffic engineering consultant
December 10	Ratliff	1¾	Investigation of feasibility of relocating community
December 11	Calhoun	4	Research and preparation of memo regarding transferability of expressway funds to expressway alternatives

YEAR 1978

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
December 12	Calhoun	¼	Phone call from Office of Civil Rights
December 12	Calhoun	¼	Phone call from Office of Civil Rights
December 13	Calhoun	¼	Phone call to Office of Civil Rights
December 22	Calhoun	2	Compilation of materials and correspondence to civil rights investigator
December 27	Calhoun	8	Preparation of Comments on revised draft EIS
December 28	Calhoun	8	Preparation of Comments on revised draft EIS
December 29	Calhoun	7	Preparation of Comments on revised draft EIS

YEAR 1979

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
January 16	Calhoun	¼	Review of correspondence from NC DOT
January 16	Ratliff	1	Meeting with anthropologist regarding community study
January 18	Ratliff Calhoun	2 2	Conference with clients
January 19	Ratliff	1	Conference with clients
January 19	Calhoun	1	TAC meeting

YEAR 1979

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
January 31	Ratliff	1	Conference with clients
February 1	Calhoun	1½	Monitor NC DOT presentation to City Council
February 1	Calhoun Ratliff	1½ 1½	Conference with clients
February 2	Calhoun	3	Compilation of census data and correspondence with U.S. Civil Rights Office
February 8	Ratliff	2	Conference with clients
February 12	Calhoun	1¾	Research and correspondence with NC DOT
February 16	Calhoun	1	Correspondence with U.S. Civil Rights Office
February 28	Ratliff	1	Conference with clients
March 6	Calhoun	2½	Monitor NC DOT hearing
March 12	Calhoun	¼	Correspondence with NC DOT
March 22	Calhoun Ratliff	1¾ 1¾	Conference with clients
March 27	Ratliff	3	Meeting with housing consultant
March 28	Calhoun	¼	Review of NC DOT correspondence
March 28	Calhoun	¼	Correspondence with NC DOT
March 30	Calhoun	¼	Call to US DOT Office of Civil Rights

YEAR 1979

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
March 30	Calhoun	¼	Call from NC DOT Administrator
April 5	Calhoun	¾	Correspondence with traffic engineering consultant
April 19	Calhoun	¼	Correspondence with NC DOT
April 20	Calhoun	2	Meeting with NC DOT Secretary regarding Expressway
April 23	Calhoun	¾	Correspondence with Office of Civil Rights
April 23	Calhoun	¼	Review of NC DOT correspondence and materials
April 27	Ratliff	¾	Conference with clients
May 3	Ratliff	2¼	Crest Street meeting
	Calhoun	2¼	
May 3	Calhoun	½	Correspondence with Tom Bradshaw
May 10	Calhoun	¼	Correspondence with traffic engineering consultant
May 14	Calhoun	1½	Compilation of materials and correspondence with Federal Highway Administrator
May 19	Ratliff	2	Conference with client
	Calhoun	2	

YEAR 1979

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
May 21	Calhoun	¼	Call to Office of Civil Rights
May 22	Calhoun	¼	Consultation with traffic engineering consultant
May 23	Calhoun	¼	Call to US DOT Office of Civil Rights
May 24	Calhoun	¼	Review of correspondence from NC DOT
May 25	Calhoun	4½	Review of University of Virginia Park and Ride systems materials
May 29	Calhoun	¼	Review of correspondence from Federal Highway Administrator
May 30	Calhoun	¼	Call to NC DOT administrator
May 30	Calhoun	2½	Monitor NC DOT Hearing
	Ratliff	2½	
June 1	Calhoun	2½	Correspondence with US DOT Office of Civil Rights
June 8	Calhoun	¼	Correspondence with NC DOT
June 15	Calhoun	¼	Call to NC DOT administrator
June 20	Calhoun	¼	Correspondence with NC DOT
June 26	Calhoun	½	Review of correspondence and materials from NC DOT

YEAR 1979

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
June 28	Ratliff	2	Meeting with clients
	Calhoun	2	
June 29	Calhoun	¼	Call to NC DOT administrator
July 2	Calhoun	1¼	Compilation of materials and correspondence with traffic engineering consultant
July 3	Calhoun	¼	Review of NC DOT correspondence
July 5	Calhoun	½	Correspondence with US DOT Office of Civil Rights
July 5	Calhoun	½	Correspondence to NC DOT
July 9	Calhoun	¼	Phone consultation with traffic engineering consultant
July 9	Calhoun	¼	Call to NC DOT
July 10	Calhoun	¼	Call from US DOT Office of Civil Rights
July 11	Calhoun	¼	Call to US DOT Office of Civil Rights
July 12	Ratliff	2	Conference with clients
	Calhoun	2	
July 15	Calhoun	1	Review of traffic engineering consultant's analysis
August 1	Calhoun	¼	Review of NC DOT correspondence and materials

YEAR 1979

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
August 3	Ratliff	¼	Phone consultation with housing consultant
August 5	Ratliff	1½	Conference with clients
	Calhoun	1½	
August 10	Calhoun	¼	Review of correspondence from NC DOT
August 13	Calhoun	3	NC DOT Expressway meeting
August 27	Calhoun	¼	Review of correspondence from NC DOT
August 31	Calhoun	¼	Call from Office of Civil Rights
August 31	Calhoun	1¾	Compilation of documents and correspondence to Office of Civil Rights
September 6	Calhoun	¼	Call to NC DOT planner
September 7	Calhoun	¼	Phone consultation with traffic engineering consultant
September 20	Calhoun	1½	Compilation of documents and correspondence with Office of Civil Rights
September 21	Ratliff	¾	Conference with clients
October 5	Calhoun	½	Correspondence and documents compilation to Office of Civil Rights
October 8	Ratliff	½	Correspondence with housing consultant

YEAR 1979

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
October 23	Calhoun	¾	Research and correspondence with NC DOT
October 24	Calhoun	¼	Phone call to NC DOT Civil Rights Coordinator
October 29	Calhoun	½	Correspondence with Office of Civil Rights
November 5	Ratliff	¼	Phone consultation with planning consultant
November 14	Ratliff	4	Orientation and meeting with housing consultant
	Calhoun	4	
November 15	Ratliff	4	Conference with clients and housing consultant
November 15	Calhoun	¼	Correspondence with NC DOT
November 16	Ratliff	6	Investigation with housing consultant
November 19	Calhoun	½	Correspondence with Office of Civil Rights
November 19	Calhoun	¼	Correspondence with Office of Civil Rights
November 19	Ratliff	¼	Phone call from Office of Civil Rights
November 30	Calhoun	¾	Review of correspondence and materials from NC DOT
December 1	Calhoun	½	Correspondence with Civil Rights Office
December 3	Ratliff	1	Planning for conference with Office of Civil Rights

YEAR 1979

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
December 4	Ratliff	5½	Conference with clients
	Calhoun	5½	
December 4	Calhoun	3	Compilation of documents and correspondence with Office of Civil Rights
December 5	Ratliff	11	Meeting with community members and Office of Civil Rights in Washington, Conference with clients
	Calhoun	11	
December 14	Calhoun	2½	Compilation of materials and correspondence of traffic engineering consultant
December 17	Ratliff	1	Review of letter from housing consultant
December 21	Calhoun	1¼	Correspondence with NC DOT
December 21	Calhoun	½	Phone consultation with traffic engineering consultant
December 28	Ratliff	2	Research and correspondence with housing consultant

YEAR 1980

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
January 11	Calhoun	1½	Research regarding Title VI record-keeping requirements for NC DOT and Federal Highway
January 11	Calhoun	¼	FOIA request to Federal Highway Administration in Washington
January 11	Calhoun	¼	Freedom of Information Act request to Federal Highway Administration
January 18	Calhoun	¼	Call from US DOT Office of Civil Rights
January 18	Calhoun	¼	Correspondence with NC DOT
January 18	Calhoun	¼	Correspondence with NC DOT
January 21	Ratliff	2	Monitoring NC DOT presentation
January 23	Calhoun	1	FOIA request to Federal Highway Administration, NC Division
January 23	Calhoun	½	Correspondence with NC DOT
January 27	Ratliff	1½	Conference with clients
February 7	Calhoun Ratliff	1½ 1½	Planning meeting
February 11	Ratliff	8	Legal research

YEAR 1980

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
February 13	Calhoun	1½	Review of NC Federal Highway FOIA materials and follow-up letter to NC Federal Highway
February 18	Calhoun	¼	Review of correspondence from NC DOT
February 21	Calhoun	¼	Phone conversation from NC Federal Highway regarding FOIA request
March 21	Ratliff	2	Conference with clients
March 23	Ratliff	1	Conference with housing consultant
March 24	Ratliff	1	Correspondence to and memo for housing consultant
March 24	Calhoun	¼	Call from US DOT Office of Civil Rights
March 25	Calhoun	¼	Call from US DOT Office of Civil Rights
March 27	Ratliff	1½	Conference with clients
March 27	Calhoun	¼	Phone conversation with NC Federal Highway
April 2	Calhoun	¼	Call from Office of Civil Rights
April 2	Ratliff	8	Legal research
April 7	Calhoun	1	Review of NC Federal FOIA supplemental materials

YEAR 1980

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
April 8	Calhoun	½	Correspondence with traffic engineering consultant
April 12	Calhoun Ratliff	2 2	Conference with housing consultant
April 13	Ratliff	4	Research and planning with housing consultants
April 14	Ratliff	4	Planning and research with housing consultants
April 14	Calhoun	¼	Phone consultation with traffic engineering consultant
April 20	Calhoun	1¼	Legal research regarding civil rights data requirements
April 29	Ratliff	¼	Phone consultation with planning consultant
May 6	Ratliff	2	Investigation of housing alternatives with consultant
May 7	Ratliff	2	Conference with clients
May 9	Ratliff Calhoun	2½ 2½	Conference with clients and drafting response to Secretary Bradshaw's proposal
June 11	Ratliff Calhoun	3 3	Preparation of Memo
June 11	Ratliff	2½	Steering Committee meeting

YEAR 1980

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
June 11	Calhoun	2½	Steering Committee meeting
June 16	Ratliff	3	Conference with housing consultant
June 18	Calhoun	½	FOIA request to Federal Highway in Washington
June 18	Ratliff	1	Conference with clients
June 19	Ratliff	6	Meeting with NC DOT regarding community survey and boundaries
July 9	Calhoun	¼	Follow-up call to Federal Highway in D.C. regarding FOIA request
July 11	Ratliff	1½	Correspondence with NC DOT
July 21	Ratliff	1	Meeting with Secretary Bradshaw
July 23	Calhoun	¼	Phone call from NC DOT planner
August 6	Calhoun Ratliff	4 4	Steering Committee meeting
August 6	Calhoun	1	Conference with clients
August 10	Ratliff	1	Conference with clients
August 13	Ratliff	2	Planning
August 22	Swanner	3	Preparation of census maps
September 2	Ratliff	1½	Conference with clients
September 2	Calhoun	1	Meeting with NC DOT

YEAR 1980

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
September 4	Ratliff	2½	Conference with housing consultants
September 4	Calhoun	¼	Phone call to US DOT
September 9	Calhoun	1¾	Task Force meeting
September 11	Ratliff	2	Conference with housing consultants
September 12	Swanner	2	Factual Research
September 15	Calhoun	¼	Call from NC DOT planner
September 15	Swanner	8	Preparation of census maps
September 16	Swanner	8	Preparation of census maps
September 17	Swanner	8	Preparation of census maps
September 18	Swanner	8	Preparation of census maps
September 19	Swanner	8	Preparation of census maps
September 25	Ratliff	2	Conference with housing consultants
October 1	Calhoun	¼	Call from NC DOT planner
October 2	Ratliff	1½	Conference with housing consultants
October 9	Swanner	8	Preparation of census maps
October 16	Ratliff	2	Conference with housing consultants
October 23	Ratliff	1½	Conference with housing consultants

YEAR 1980

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
October 28	Ratliff	1	Conference with housing consultants
October 29	Calhoun	4	Steering Committee meeting and tour of community
	Ratliff	4	
October 30	Ratliff	2	Conference with housing consultants
November 4	Calhoun	3	Factual research
November 5	Ratliff	2½	NC DOT Task Force meeting
November 6	Ratliff	1½	Conference with housing consultant
November 10	Calhoun	¼	Phone consultation with traffic engineering consultant
November 13	Ratliff	2½	Conference with housing consultants
November 14	Ratliff	2	Meeting with US DOT Office of Civil Rights Representative
November 14	Swanner	3	Factual research
November 15	Ratliff	4	Meeting with US DOT Office of Civil Rights representative
	Calhoun	4	
November 16	Ratliff	4	Meeting with US DOT Office of Civil Rights representative
	Calhoun	4	
November 17	Swanner	8	Preparation of census maps

YEAR 1980

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
November 18	Ratliff	2	Conference with clients
November 18	Ratliff	½	Memo to NC DOT
November 18	Swanner	8	Preparation of census maps
November 19	Swanner	8	Preparation of census maps
November 20	Swanner	8	Preparation of census maps
November 21	Swanner	8	Preparation of census maps
November 21	Ratliff	2	Conference with traffic engineering consultant
	Calhoun	2	
November 21	Ratliff	1½	Conference with housing and traffic engineering consultants
	Calhoun	1½	
November 21	Ratliff	3	Conference with clients
	Calhoun	3	
November 22	Calhoun	4	Field investigation with traffic engineering consultant
November 24	Swanner	8	Preparation of census maps
November 24	Calhoun	½	Correspondence with traffic engineering consultant
November 28	Calhoun	2	Review of traffic engineering consultant alternative plan
December 4	Ratliff	1	Conference with housing consultant

YEAR 1980

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
December 5	Calhoun	¾	Correspondence with US DOT Office of Civil Rights
December 17	Ratliff	3	Conference with housing consultant

YEAR 1981

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
January 12	Ratliff	5	Legal Research
February 1	Ratliff	1½	Conference with clients
February 4	Ratliff	2	Conference with housing consultant
February 9	Calhoun	¼	Review of correspondence from NC DOT
February 11	Ratliff	2	Conference with housing consultant
February 18	Ratliff	1¾	Conference with housing consultant
February 20	Ratliff	½	Correspondence with planning consultant
February 22	Ratliff	2	Conference with clients
February 25	Ratliff	1½	Conference with housing consultant
February 26	Ratliff	¼	Phone consultation with planning consultant
March 4	Calhoun	¼	Phone consultation with traffic engineering
March 18	Ratliff	1½	Conference with housing consultant

YEAR 1981

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
March 18	Ratliff	2	Conference with housing consultant
March 23	Calhoun	¼	Phone conference with US DOT
March 24	Ratliff	1	Conference with planning consultant
March 25	Ratliff	5	Research and conference with planning consultant
March 26	Ratliff	2	Conference with planning consultant
April 1	Ratliff	1	Conference with housing consultant
April 2	Ratliff	1¼	Conference with clients
April 8	Ratliff	2	Conference with housing consultant
April 10	Calhoun	¼	Phone conference with US DOT
April 15	Ratliff	1½	Conference with housing consultant
April 22	Ratliff	1	Conference with housing consultant
April 29	Ratliff	2	Conference with housing consultant
May 6	Ratliff Calhoun	2 2	Meeting with NC DOT
May 28	Ratliff	1½	Conference with housing consultant
June 1	Calhoun	¼	Phone conference with US DOT
June 9	Ratliff Calhoun	2 2	Conference with clients

YEAR 1981

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
June 14	Ratliff	1	Conference with clients
June 28	Ratliff	1½	Conference with clients
July 8	Ratliff Calhoun	2 2	Conference with clients
July 21	Ratliff	¼	Phone consultation with planning consultant
July 31	Calhoun	3	Review of planning consultant report
July 31	Calhoun	¼	Phone conference with US DOT
August 2	Ratliff	1½	Conference with clients
August 3	Calhoun	¼	Phone consultation with traffic engineering consultant
August 4	Ratliff	3	Review of planning consultant recommendation
August 5	Ratliff Calhoun	1½ 1½	Meeting with Steering Committee representative
August 19	Ratliff Calhoun	1½ 1½	Planning
August 20	Ratliff	¼	Correspondence to planning consultant
August 31	Ratliff Calhoun	3 3	Conference with clients
September 1	Ratliff	3	Conference with clients
September 3	Ratliff	½	Phone consultation with planning consultant

YEAR 1981

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
September 3	Calhoun	¼	Phone conference with US DOT
September 8	Ratliff	3	Meeting with DOT
	Calhoun	3	
September 11	Ratliff	2	Correspondence to planning consultant
September 11	Calhoun	¼	Correspondence with traffic consultant
September 11	Calhoun	2½	Preparation of settlement proposal and correspondence to NC DOT
	Ratliff	1	
September 30	Calhoun	2	Meeting with NC DOT
	Ratliff	2	
October 1	Calhoun	¾	Phone conference with US DOT
October 1	Calhoun	¼	Phone consultation with traffic engineering consultant
October 7	Calhoun	¼	Phone conference with NC DOT
October 12	Ratliff	2	Task Force Meeting
October 15	Ratliff	2	Meeting with NC DOT, Federal Highway Administration, Duke and the City regarding alternatives and extent of Title VI mitigation
	Calhoun	2	
October 25	Ratliff	2	Conference with clients
October 27	Ratliff	2	Settlement negotiations
	Calhoun	2	

YEAR 1981

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
October 30	Calhoun	¼	Phone conference with US DOT
November 2	Ratliff	½	Conference with clients
	Calhoun	½	
November 2	Ratliff	2	Settlement negotiations
	Calhoun	2	
November 5	Ratliff	2	Meeting with clients
	Calhoun	2	
November 10	Calhoun	¼	Phone consultation with traffic engineering consultant
November 10	Ratliff	¼	Phone consultation with planning consultant
November 12	Calhoun	¾	Correspondence with traffic consultant
November 16	Calhoun	¼	Phone consultation with traffic engineering consultant
November 19	Ratliff	1½	Settlement negotiations
	Calhoun	1½	
November 20	Calhoun	1	Preparation of minutes
November 20	Calhoun	¼	Phone conference with US DOT
November 22	Calhoun	1¼	Review of traffic consultant alternatives
November 23	Calhoun	2	Consultation with planner
	Ratliff	2	
December 1	Ratliff	½	Factual research
	Calhoun	½	

YEAR 1981

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
December 1	Ratliff	2½	Meeting with clients
	Calhoun	2½	
December 6	Ratliff	1	Conference with planning consultant
December 7	Calhoun	2	Consultation with planning consultant
December 7	Ratliff	2	Consultation with planning consultant
December 8	Calhoun	2	Meeting with clients
December 9	Calhoun	1¾	Settlement negotiations
December 10	Calhoun	1	Preparation of minutes
December 16	Ratliff	3½	Settlement negotiations
	Calhoun	3½	
December 16	Ratliff	2	Legal research
December 17	Ratliff	1	Preparation of minutes
December 23	Calhoun	¼	Phone conference with US DOT

YEAR 1982

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
January 6	Ratliff	3½	Settlement negotiations
	Calhoun	3½	
January 7	Ratliff	1	Preparation of minutes

YEAR 1982

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
January 19	Calhoun	¼	Investigation regarding feasibility of relocation
January 20	Ratliff	4	Settlement negotiations
	Calhoun	4	
January 21	Ratliff	1	Preparation of minutes
January 22	Calhoun	¼	Correspondence with traffic engineering consultant
January 25	Ratliff	1	Settlement negotiations
	Calhoun	1	
February 1	Calhoun	¼	Phone conference with US DOT
February 3	Calhoun	2½	Conference with clients
	Ratliff	2½	
February 4	Calhoun	1¼	Analysis of traffic engineering consultant alternatives
February 10	Calhoun	¼	Phone consultation with traffic engineering consultant
February 11	Calhoun	¼	Phone conference with NC DOT
February 12	Calhoun	¼	Phone conference with NC DOT
February 17	Ratliff	2½	Settlement negotiations
	Calhoun	2½	
February 19	Ratliff	1	Meeting with NC DOT
	Calhoun	1	

YEAR 1982

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
February 22	Ratliff	½	Phone consultation with planning consultant
February 23	Ratliff	3	Settlement negotiations
	Calhoun	3	
February 24	Calhoun	5	Preparation for settlement negotiations
	Ratliff	5	
February 24	Ratliff	4	Settlement negotiations
	Calhoun	4	
February 24	Calhoun	4½	Drafting of mitigation plan
February 25	Calhoun	5½	Final preparation of mitigation plan
	Ratliff	1½	
February 25	Ratliff	1	City Council meeting regarding approval of mitigation plan
	Calhoun	1	
February 26	Calhoun	¼	Phone conference with US DOT
March 12	Calhoun	¼	Phone consultation with traffic engineering consultant
March 12	Calhoun	¼	Correspondence with traffic engineering consultant
March 15	Calhoun	1	Conference with housing expert regarding house moving
March 29	Calhoun	3	Conference with NC DOT
	Ratliff	3	right-of-way representative regarding final mitigation plan preparation

YEAR 1982

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
April 5	Ratliff	¼	Phone conference with NC DOT
April 8	Ratliff	¼	Phone conference with NC DOT
April 16	Calhoun	¼	Phone conference with US DOT
April 16	Ratliff	½	Phone consultation with planning consultant
April 20	Calhoun	1	Correspondence with US DOT Office of Civil Rights
April 20	Calhoun	¾	Review of planning consultant affidavit
April 23	Calhoun	2	Conference with City, State and Federal Highway Administration regarding final mitigation plan preparation
April 23	Ratliff	3	Meeting with DOT and City to develop final mitigation plan
	Calhoun	3	
May 3	Calhoun	2½	Review of final Environmental Impact statement draft
May 3	Calhoun	¼	Phone conference with North Carolina Federal Highway Administration regarding final mitigation plan

YEAR 1982

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
May 10	Calhoun	¼	Correspondence with NC DOT regarding final mitigation plan
May 12	Calhoun	1½	Conference with City, State and Federal Highway Administration regarding final mitigation plan provisions
June 16	Ratliff	¼	Phone consultation with planning consultant
July 20	Calhoun	2½	Conference with clients
July 22	Calhoun	¼	Phone conference with US DOT
August 23	Calhoun	1½	Conference with City, State and Federal Highway Administration regarding development of final mitigation plan
August 26	Calhoun	2	Conference with City, State and Federal Highway Administration regarding final mitigation plan
September 1	Calhoun	¼	Phone consultation with traffic engineering consultant
September 1	Calhoun	¾	Phone conference with North Carolina Federal Highway Administration
September 7	Calhoun	2	Meeting with City, State and Federal Highway Administration regarding final mitigation plan

YEAR 1982

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
September 3	Calhoun	½	Legal consultation regarding City authority
September 10	Calhoun	2	Conference with housing attorney expert regarding City authority for mitigation plan
September 15	Calhoun	1½	Conference with City, State and Federal Highway Administration regarding final mitigation plan
September 29	Calhoun	¼	Phone conference with NC DOT
October 12	Calhoun	¼	Phone conference with NC DOT
October 14	Calhoun	7	Preparation of motion to intervene and proposed complaint
October 22	Calhoun	1½	Conference with City attorney regarding draft of final mitigation plan and contract
October 22	Calhoun	2½	Review of draft of final mitigation plan and contract
October 25	Calhoun	3½	Negotiation meeting with NC DOT and City regarding final mitigation plan

YEAR 1982

CREST STREET ATTORNEYS' FEES

DATE	ATTY.	HRS.	ACTIVITY
November 1	Calhoun	4	Negotiations with NC DOT and City regarding final mitigation plan
November 2	Calhoun	5	Negotiations with NC DOT and City regarding final mitigation plan
November 4	Calhoun	6½	Negotiations with City and NC DOT regarding final mitigation plan
December 3	Calhoun	2	Meeting with City and NC DOT regarding final mitigation plan
December 10	Calhoun	3½	Preparation of consent judgment
December 14	Calhoun	2½	Review of final mitigation plan and municipal agreement drafts

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA
DURHAM DIVISION

File No. C-83-1239-D

(Parties omitted in printing)

ANSWER

(Filed 22 December 1983)

The defendants North Carolina Department of Transportation, North Carolina Board of Transportation, and William R. Roberson, as Secretary of the North Carolina Department of Transportation and Chairman of the North Carolina Board of Transportation, through their undersigned counsel, answer the Complaint herein as follows:

FIRST DEFENSE

The Court lacks jurisdiction over the subject matter of the action and over the person of the defendants.

SECOND DEFENSE

In essence this is an action against the State of North Carolina, which has not consented to suit nor otherwise waived its sovereign immunity or its immunity from suit under the Eleventh Amendment to the Constitution of the United States.

THIRD DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

FOURTH DEFENSE

The plaintiff lacks standing to bring and maintain this action.

FIFTH DEFENSE

The plaintiff has failed to pursue and exhaust its administrative remedies.

SIXTH DEFENSE

The consent judgment in an action brought in the United States District Court for the Middle District of North Carolina captioned Ecos, Inc., et al, Plaintiffs, v. Claude S. Brinegar, et al, Defendants (No. C-352-D-72) is an adjudication on the merits in favor of these defendants as to the claims of civil rights violations therein asserted with respect to the Durham East-West Freeway and the plaintiff is thereby barred by collateral estoppel from maintaining this action.

SEVENTH DEFENSE

Answering specifically the numbered paragraphs of plaintiff's Complaint using the same format and paragraph numbering, the defendants respond and say as follows:

INTRODUCTION

1. Plaintiff's characterization of the legal nature of his action requires no answer; but to the extent an answer is deemed required, the allegations of paragraph 1 are denied.

PARTIES

2. The allegations of paragraph 2 are admitted upon information and belief except the allegation that all of the plaintiff's members reside in Durham, North Carolina, is denied for lack of knowledge or information sufficient to form a belief as to the truth thereof.

3. The defendants admit with the qualification herein stated that the North Carolina Department of Transportation is an agency of the State of North Carolina; that its powers, duties and responsibilities are as provided by law and include the responsibility for determining the selection, location and design of Federal-aid highways in North Carolina, including the Durham East-West Freeway, for recommendation of such selection, location and design to the Secretary of the United States Department of Transportation who has the ultimate decision making power with respect to such matters; and that the North Carolina Department of Transportation is responsible for carrying out the construction of such highways.

4. The defendants admit that the North Carolina Board of Transportation has the powers, duties, and responsibilities with respect to the North Carolina Department of Transportation as provided by law but deny that it is the "governing body" thereof.

5. The defendants admit that William R. Roberson is Secretary of the North Carolina Department of Transportation, and, *ex officio,* is Chairman of the North Carolina Board of Transportation.

JURISDICTION

6. The plaintiff's allegations of the statutory basis of the jurisdiction of the Court do not require an answer;

but, to the extent an answer may be deemed to be required, the allegations of paragraph 6 of the Complaint are denied.

FACTS

7. Defendants admit that in 1976 the North Carolina Department of Transportation resumed planning measures for the purpose of completing construction of the Durham East-West Freeway, a portion of which, if implemented as then planned, would pass through the Crest Street community, a stable, cohesive, black neighborhood in Western Durham, North Carolina. Except as admitted, the defendants deny the allegations of paragraph 7 of the Complaint.

8. Defendants admit the allegations of paragraph 8 of the Complaint.

9. Defendants admit that to the extent planning for the location and design of the freeway, had been developed by the North Carolina Department of Transportation (working in cooperation with the Federal Highway Administration) in 1976, it was apparent that construction of the freeway and its interchange in the Crest Street community would have a substantial harmful effect upon it, would displace many persons (including, in response to its own request, the community church), and would physically divide the community. Defendants further admit that the lengthy planning for construction of the freeway had a chilling effect on public and private development in its proposed path, including public and private development in the Crest Street community. Except as admitted herein, defendants deny the allegations of paragraph 9 of the Complaint.

10. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 10 of the Complaint.

11. Defendants admit that during 1977 and 1978 defendants received communications opposing construction of the freeway through the Crest Street community from persons and organizations within and without the community and requests for traffic data and that defendants proceeded with issuing a revised draft environmental impact statement for the freeway through the Crest Street community. Except as admitted, defendants deny the allegations of paragraph 11 of the Complaint.

12. Defendants admit the Durham East-West Freeway was and is a Federal-aid highway project, with Federal funds providing approximately seventy-five percent (75%) of the costs of the project (except for the segment between Irwin Road and Chapel Hill Street, which was constructed wholly with State funds).

13. Defendants admit that in September 1979 Save Our Church And Community Committee, Durham, North Carolina and Residents of Crest Street Community, Durham, North Carolina, as Complainants, filed an "Administrative Complaint" against Brock Adams, Secretary of Department of Transportation, and other federal officials, as Respondents, pursuant to the provisions of 49 CFR 21.11 (1977) seeking an investigation of the practices of the North Carolina Department for compliance with Title VI of the Civil Rights Act of 1964 and 49 CFR 21 (1977) with respect to the Durham East-West Freeway (and the Federal-aid highway program for entire State) as well as compliance with other Federal-aid eligibility laws. Ex-

cept as admitted, defendants deny the allegations of paragraph 13 of the Complaint.

14. Defendants admit that the Director of Civil Rights of the United States Department of Transportation, without the notification required by law, proceeded to have the allegations of the "Administrative Complaint" investigated and sent a field investigator to the Raleigh-Durham area; that the investigator spent some time obtaining information and materials from the complainants and their representatives and from the professional staff of the North Carolina Department of Transportation; that by letter dated 20 February 1980 the Director of Civil Rights informed the Secretary of the North Carolina Department of Transportation of "our preliminary judgments concerning the alignment proposed in the Draft EIS and challenged by the Title VI complaint, so that you may take them into account in your future planning . . . " and her conclusion, that based upon her "preliminary judgments, we find reasonable cause to believe that the construction of the Expressway along the alignment proposed in the Draft EIS would constitute a prima facie violation of Title VI and, in particular, Section 21.5(b)(3) of our Departmental Title VI regulation . . . " Except as admitted, defendants deny the allegations of paragraph 14 of the Complaint.

15. Defendants admit that subsequent to the 20 February 1980 letter from the Director of Civil Rights to the Secretary of the North Carolina Department of Transportation members of the staff of the North Carolina Department of Transportation met extensively with complainants and plaintiff, and their representatives, other opponents of the freeway, and representatives of the City of Durham, Federal Highway Administration and United States Department of Transportation for the purpose of resolving the controversy about further construction of the freeway. Defendants further admit that in February 1982, plaintiff, the North Carolina Department of Transportation (with the approval of the Federal Highway Administration) and the City of Durham reached agreement on a concept for a combination of expressway design, relocation assistance benefits and Federally assisted housing and community program to be provided by the Department and the City in order to mitigate the adverse impact of the expressway construction on the Crest Street community and that the intent of this agreement is to preserve and strengthen the Crest Street community. Defendants also admit that in this agreement plaintiff specifically asserted and reserved, and the Department and the City denied, any right of plaintiff to receive its attorney fees. Except as admitted herein, defendants deny the allegations of paragraph 15 of the Complaint.

16. Defendants deny that plaintiff moved to intervene in the case of Ecos, Inc. et al v. Brinegar, et al prior to the agreement as to settlement and the mitigation plan being reached between plaintiff, the North Carolina Department of Transportation and the City of Durham.

17. Defendants deny that the settlement agreement is the direct result of the legal proceedings and actions for which plaintiff now seeks attorneys' fees.

18. Defendants admit plaintiff has presented the North Carolina Department with a statement of expenses and attorney fees and defendants have refused to pay the

statement. Except as admitted, the allegations of paragraph 18 of the Complaint are denied.

CLAIM FOR RELIEF

19. Defendants deny the allegations of paragraph 19 of the Complaint.

EIGHTH DEFENSE

Under the special circumstances of this case it would be unjust and inequitable to require the defendants pay the plaintiff's expenses and attorneys fees.

NINTH DEFENSE

Upon information and belief the expenses and attorney fees claimed by the plaintiff are excessive and unwarranted.

PRAYER FOR RELIEF

Wherefore, defendants pray for relief as follows:

(1) That this action be dismissed.

(2) That as a matter of law the plaintiff's prayer for relief be denied.

(3) That in the discretion of the Court the plaintiff's prayer for relief be denied.

(4) That defendants be given a complete and accurate accounting of any expenses and attorney fees of the plaintiff which the defendants may be required to pay.

(5) That the defendants be granted such other relief as the Court finds to be just and proper.

This the 21 day of December, 1983.

RUFUS L. EDMINSTEN
Attorney General

s/ James B. Richmond
Special Deputy Attorney General
N. C. Department of Justice
Raleigh, North Carolina
Attorney for Defendants

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

File No. C-83-1239-D

(Parties omitted in printing)

AMENDMENT TO COMPLAINT

(Filed 22 June 1984)

Plaintiff amends its complaint as follows:

A. Plaintiff amends the style of this action to read:

CREST STREET COMMUNITY COUNCIL, INC., RESIDENTS OF CREST STREET COMMUNITY, and SAVE OUR CHURCH AND COMMUNITY COMMITTEE,

Plaintiffs,

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, NORTH CAROLINA BOARD OF TRANSPORTATION, and WILLIAM R. ROBERSON, as Secretary of the North Carolina Department of Transportation and Chairman of the North Carolina Board of Transportation,

Defendants.

B. Plaintiff adds the following parties:

1. The Residents of Crest Street Community is an association of Crest Street residents which was organized in 1976 as a community council of Carolina Action for the purpose of preserving and improving the Crest Street Community.

2. Save Our Church and Community Committee is a committee of representatives from the Residents of

Crest Street Community who are authorized by the Residents of Crest Street Community to act on its behalf.

C. Plaintiff amends its factual allegations as follows:

1. Paragraph 13 of the original complaint should be amended to read as follows:

"13. In September 1973 plaintiffs, the Residents of Crest Street Community and the Save Our Church and Community Committee, under Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000d, and pursuant to the United States Department of Transportation (USDOT) Title VI procedures set out in 49 CFR 21, filed an administrative complaint with the United States Department of Transportation, stating that plaintiff's civil rights were being violated by the defendants' plans and efforts to construct an expressway through the Crest Street Community. Subsequent to the filing of this Administrative Complaint, the Crest Street Community Council, Inc. was incorporated and it assumed the purposes and activities, including prosecution of the Administrative Complaint, of the Residents of Crest Street Community and the Save Our Church and Community Committee."

D. Everywhere that "plaintiff" appears in the original complaint, it should be amended to read "plaintiffs", and where appropriate "its" should be amended to read "their."

This the 21st day of June, 1984.

NORTH CENTRAL LEGAL ASSISTANCE PROGRAM

DURHAM, NORTH CAROLINA

ATTORNEYS FOR PLAINTIFFS

s/ BY ALICE A. RATLIFF

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

File No. C-83-1239-D

(Parties omitted in printing)

ANSWER TO
AMENDMENT TO COMPLAINT

(Filed 3 July 1984)

The defendants North Carolina Department of Transportation, North Carolina Board of Transportation, and William R. Roberson, as Secretary of the North Carolina Department of Transportation and Chairman of the North Carolina Board of Transportation, through their undersigned counsel, answer the Amendment to Complaint herein as follows:

1. These defendants adopt by reference all of the defenses and the allegations therein as set forth in their Answer filed in this cause dated 21 December 1983 as if set forth verbatim herein.

2. Answering specifically the allegations of the Amendment to Complaint, these defendants say and allege as follows:

A. These defendants admit that the plaintiff has amended the style of this action to read as set forth in paragraph A of the Amendment to Complaint.

B. The allegations of paragraphs B 1 and 2 of the Amendment to Complaint are denied.

C. It is admitted that in September 1978 a document styled an "Administrative Complaint" was filed against

named Federal officials by "Save Our Church and Community Committee, Durham, North Carolina;" and "Residents of Crest Street Community, Durham, North Carolina" as complainants. It is further admitted that subsequent to the filing of this "Administrative Complaint" the Crest Street Community Council, Inc. was incorporated. Except as admitted herein, the allegations of paragraph 13 of the original Complaint as amended by paragraphs C 1 of the Amendment to Complaint are denied.

D. The allegations of paragraph D of the Amendment to Complaint are admitted.

This the 2nd day of July, 1984.

RUFUS L. EDMISTEN
Attorney General

s/ James B. Richmond
Special Deputy Attorney General
N. C. Department of Justice
Raleigh, North Carolina
Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

File No. C-83-1239-D

(Parties omitted in printing)

MOTION FOR SUMMARY JUDGMENT

(Filed 8 August 1984)

Plaintiffs, by their attorneys and pursuant to Rule 56 of the Rules of Civil Procedure, move the court to enter summary judgment for the plaintiffs on the ground that there is no genuine issue as to any material fact, and the plaintiffs are entitled to judgment as a matter of law.

In support of this motion, plaintiffs refer to the record herein, including the amended complaint and answer thereto, the discovery in this action and the affidavits filed by plaintiffs in support of this motion.

This the 8 day of August, 1984.

NORTH CENTRAL LEGAL ASSISTANCE PROGRAM

Attorneys for Plaintiffs

s/ BY: MICHAEL D. CALHOUN
Durham, North Carolina

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

File No. C-83-1239-D

(Parties omitted in printing)

AFFIDAVIT OF WILLIE PATTERSON

(Filed 8 August 1984)

WILLIE PATTERSON, being first duly sworn, deposes and says:

1. I am a resident of the Crest Street Community and I have lived in the Crest Street Community for all of my life except for my time in service in the armed forces and I lived in the Community continuously for the last ten years.

2. The Residents of Crest Street Community is an association of Crest Street residents which was organized in 1976 as a community council of Carolina Action, a not for profit organization providing assistance to low-income and moderate income neighborhoods, for the purpose of preserving and improving the Crest Street Community. I have been president of this association since it was organized.

3. The Save Our Church and Community Committee is a committee of representatives from the New Bethel Baptist Church and Residents of Crest Street Community who are authorized by the Residents of Crest Street Community to act on its behalf. I have been the acting chairman of the Save Our Church and Community Committee since its formation in 1977.

4. The Crest Street Community is a cohesive black community with approximately 200 households in the western part of Durham County, North Carolina. Our community which is over one hundred years old, is very close knit and it provides support services to its members, and particularly to the substantial number of elderly persons in the community. We have a low crime rate in the community and our children attain high levels of educational achievement. Our community is centered around the New Bethel Baptist Church and a majority of the community residents are members of the Church and regularly attend its services.

5. The Durham East/West Freeway has had an impact on the Crest Street Community for many years. The project was proposed and designated a high priority in the late 1950s. The design and location of the Freeway, as originally planned and as later revised, would have had a devastating impact on the Crest Street Community. The plans called for a major interchange to be built in the middle of the community. More than half of the community residents would be displaced by the right-of-way for the project as would the community church and park. The remaining residents would be isolated from each other by Freeway ramps and would be subject to intense commer-

cialization pressure. Even though the Freeway was planned in the 1950s, active efforts to initiate construction of the section of the Freeway that would displace the Crest Street Community did not begin until the mid 1970s. The effect of the long delays in implementing the East/West Freeway was that private and public investors were discouraged from putting money into the Community because they feared that the Expressway would be built soon and would destroy any improvements. Consequently, though our community was strong in spirit, the physical infrastructure of the community was in poor condition by the late 1970s. Our streets were dirt or temporary strip paving and many of the streets were nearly impassable. For recreational facilities, we had only a small "lot" park with minimal equipment. And, our houses were in poor repair. We sought assistance from the City of Durham, such as it had provided other similar neighborhoods, to improve these conditions. However, the assistance was denied on the basis that the Freeway would destroy any improvements.

6. When the North Carolina Department of Transportation began in 1976 to actively proceed with plans to begin construction of the section of the Freeway which would displace much of the Crest Street Community, the community expressed its opposition to these plans to the North Carolina Department of Transportation. The residents of the Crest Street Community retained the North Central Legal Assistance Program in March of 1977 to represent it concerning the planning and construction of the East/West Freeway and remedial efforts to mitigate the past adverse impact of the Freeway on the community. Shortly thereafter the Save our Church and Community Committee was formed as a representative of the community asso-

ciation and the New Bethel Baptist Church and, it too, retained the North Central Legal Assistance Program for representation in these matters.

7. In September 1978, the residents of the Crest Street Community and the Save Our Church and Community Committee, filed an administrative complaint pursuant to 49 CFR 21, with the United States Department of Transportation asserting that the planning and construction of the East/West Freeway was in violation of Title VI of the Civil Rights Act of 1964. (A copy of this administrative complaint is attached hereto as Exhibit A and is incorporated by reference.)

8. On February 4, 1980, the Crest Street Community Council, Inc. was incorporated and it assumed the purposes and activities, including prosecution of the admin istrative complaint, of the Residents of Crest Street Community and the Save Our Church and Community Committee.

9. In February 1980 the United States Department of Transportation, Office of Civil Rights, in response to the administrative complaint, issued a preliminary finding that the Community residents' rights under Title VI were being violated. (A copy of this finding is attached hereto as Exhibit B and is incorporated by reference.) Subsequent to this finding, plaintiffs entered into extended negotiations with defendants and other parties seeking to resolve the issues raised by the administrative complaint.

10. In February 1982, plaintiffs reached preliminary agreement with the City of Durham and with representatives of the defendants as to a preliminary mitigation concept which would address the issues raised in the admin-

istrative complaint. Negotiations on a final mitigation plan to finally resolve these issues continued.

11. Since 1972, the East/West Freeway has been the subject of an action pending in the United States District Court for the Middle District of North Carolina under the title *ECOS, Inc., et al. v. Brinegar, et al.*, File No. C-352-D-72. In October 1982, the Crest Street Community Council, Inc., moved to intervene in this action, asserting, *inter alia,* its rights under Title VI of the Civil Rights Act of 1964. (A copy of this Motion is attached hereto as Exhibit C and incorporated by reference.)

12. During this time plaintiffs continued negotiations with the defendants and reached final agreement, which was executed by the plaintiffs and defendants on December 15, 1982. (A copy of this Final Mitigation Plan and the accompanying municipal agreement between the City of Durham and the North Carolina Department of Transportation is attached hereto as Exhibits D and E, respectively, and incorporated by reference. The attachments which are referred to in Exhibit E are not relevant to the case at bar and thus have been omitted.) At this same time, plaintiffs, defendants and other parties in the *ECOS* action, submitted a proposed consent judgment to this Court and this Court entered the judgment which dismissed that action. (A copy of this Judgment is attached hereto as Exhibit F and is incorporated by reference.)

13. Under the terms of the Final Mitigation Plan, the location and design of the Freeway in the Crest Street Community was modified and the community will be relocated together, with greatly improved housing and public facilities to the western part of the existing community

site and adjoining vacant land. The Freeway location was moved to the north and the interchange design was narrowed. These changes eliminated the taking of the Community park and church, reduced the number of households displaced and allowed more land for the new community site. The new community will have fully paved, curbed and guttered streets with sidewalks, as well as substantial recreational facilities, including a baseball field, lighted basketball courts and a community center. Regarding housing, conditions will be dramatically improved for both owners and renters.

14. The implementation of the Mitigation Plan agreed to by plaintiffs and defendants, though only half complete, appears to be both substantially improving the housing and infrastructure of the Crest Street Community and preserving our community spirit.

s/ Willie Patterson

(Jurat omitted in printing)

EXHIBIT A

BEFORE THE SECRETARY
OF THE
UNITED STATES DEPARTMENT OF
TRANSPORTATION

September 7, 1978

No. .....

COMPLAINANTS:

SAVE OUR CHURCH AND COMMUNITY COMMITTEE, DURHAM, NORTH CAROLINA;

RESIDENTS OF CREST STREET COMMUNITY, DURHAM, NORTH CAROLINA.

RESPONDENTS:

BROCK ADAMS, SECRETARY DEPARTMENT OF TRANSPORTATION;

KARL S. BOWERS, ADMINISTRATOR, FEDERAL HIGHWAY ADMINISTRATION;

RICHARD PAGE, ADMINISTRATOR, URBAN MASS TRANSPORTATION ADMINISTRATION;

J. D. LACY, REGION IV ADMINISTRATOR, FEDERAL HIGH ADMINISTRATION;

T. J. MOROWSKI, DIVISION ADMINISTRATOR, FEDERAL HGHWAY ADMINISTRATION.

ADMINISTRATIVE COMPLAINT

PARTIES

Complainants to this administrative action are the residents of Crest Street Community and the Save Our Church and Community Committee. Crest Street Community is a long-established black community of over 200 households

located in the western part of Durham, North Carolina. The Save Our Church and Community Committee is a neighborhood association representing the residents of Crest Street Community in their efforts to prevent the destruction of their community by the proposed extension of the Durham East/West Expressway, a Federal-Aid Highway project. Respondents are the Secretary of the United States Department of Transportation, or the Federal Highway Administrator, the Urban Mass Transportation Administrator, and the Region IV and Division Administrators of the Federal Highway Administration.

JURISDICTION

The Department of Transportation has jurisdiction over this action pursuant to:

1. 23 CFR 450.122 (1977) which provides that the Federal Highway and Urban Mass Transportation Administrators shall review and evaluate the transportation planning process in each urbanized area;

2. 23 CFR 795.5(g) and 795.6(a) (1977), which provide that the Federal Highway Administration is responsible for the review of the Action Plan and its implementation;

3. 23 CFR 771.2(b) (1977) which provides that the Federal Highway Administration Division Administrator shall review the draft EIS; and

4. 49 CFR 21.11 (1977) which provides that the Secretary shall review the practices of recipients to determine if they are complying with Title VI of the Civil Rights Act of 1964 and 49 CFR 21 (1977).

INTRODUCTION

The Save Our Church and Community Committee ("SOCCC") and the residents of Crest Street Community bring this action against the illegal and inappropriate administrative actions taken by the North Carolina Department of Transportation ("NCDOT") and the United States Department of Transportation ("DOT") regarding the proposed extension of the Durham East/West Expressway project through the Crest Street Community. Construction of this project would take the community church and over half of the homes in the community. The remaining homes would be separated from each other by ramps and roadways. In short, a large stable, cohesive, long-standing, black neighborhood would be destroyed. Furthermore, this project has been planned for many years. The continued threat of the extension of the expressway would perpetuate the years of deprivation of municipal and federal spending in the community to the fear that any improvements would soon be destroyed.

STATEMENT OF CLAIMS

The proposal to extend the expressway through Crest Street Community is violative of 23 USC § 109(h) (1978 Supp.) 23 CFR 450, (1977), DOT FHWA Instructional Memorandum 50-3-71, DOT FHWA Policy and Procedure Memorandum 50-9, 23 USC 109(h) (1978 Supp.), the National Environmental Policy Act, 42 USC § 4331 *et seq.* (1974), 23 CRF parts 771 and 795 (1977), DOT FHWA Program Manual 7-7-1 and 2, Title VI of the Civil Rights Act of 1964, 42 USC § 2000d (1970), Title VIII of the Civil Rights Act of 1968, 42 USC § 3601 *et seq.* (1970) and 49 CFR 21 (1977).

In support of these claims complainants put forward the following facts:

PROGRAM PLANNING

1. The Durham Urban Area has no current thoroughfare plan nor does it have current data on which to base an accurate thoroughfare plan. The last Durham thoroughfare plan was based on a study issued by Harlen Bartholomew and Associates in 1967. This study was based on data collected in 1964. There have been no comprehensive studies to evaluate the current validity of this eleven year old thoroughfare plan. Nor has there been any attempt to collect current origin/destination data or other trip data.

2. Due to this lack of thoroughfare planning there has been no public participation in or comment on thoroughfare planning since the 1967 report was presented.

3. The NCDOT thoroughfare planning unit is currently revising the Durham thoroughfare plan. However, they have not collected any new origin/destination data and they do not intend to collect any such data before completing their revision. Furthermore, NCDOT plans to issue the draft EIS on the East/West Expressway before the completion of this revision of the Durham thoroughfare plan.

PROJECT PLANNING

1. The Durham East/West Expressway was originally planned in the late 1950s. It was originally conceived as an intra-city bypass to U.S. 70. In the 1960s the concept of the project was expanded. During that time the

expressway was constructed from Interstate 40 at the Research Triangle Park to the middle of Durham. It was also at this time that plans were made to extend the project to I-85 west of Durham. Additional sections of the expressway were constructed to Erwin Road in 1973. NCDOT presently proposes to extend the expessway to U.S. 15-501.

2. As with the program planning, sufficient data is not available to study this proposed extension of the expressway. In December 1977 complainants, through their counsel, requested certain data from NCDOT. Among these items requested were: (a) a trip table; (b) selected link analysis for the proposed expressway sections between 15-501 and Erwin Road; (c) regional projections of population and automobile ownership; (d) the forecasting technique, including models and regression equations, used in the project analysis; (e) historical data, including population and average daily traffic counts for Hillsborough Road, on an annual basis from 1965 to the present. NCDOT in response to complainants' counsel supplied none of these materials. They stated in part: "Current trip tables are not available at the present time"; "Since traffic has not yet been assigned to the network and analyzed, a selective link analysis is not available at the present time"; and "The general procedures used in forecasting traffic for the thoroughfare plan are shown on the enclosed flow chart. The actual models and regression equations will be summarized in technical reports that are being prepared but are not available at the present time."

3. Complainants' counsel have renewed the request for this information several times during the current year. NCDOT has still not yet provided this data. Com-

plainants' counsel also requested that since this data was essential to analyze the project, NCDOT should not issue the draft EIS on this project until complainants' counsel received this information and had sufficient time to evaluate and prepare alternatives to the NCDOT plan. In response to this request NCDOT stated they would issue the draft EIS before this material became available.

4. This data is essential to evaluation of the proposed extension of the expressway and any alternatives to this action. Complainants have retained a traffic engineer for consultation in this matter. The absence of this data prevents complainants and other citizens from participating in this project. The absence of this data also prevents NCDOT from making any good faith considerations of alternatives.

5. NCDOT has in fact failed to make a good faith study of alternatives. Complainants and other citizens' groups in Durham have requested that a combination of actions, to reduce the traffic demands on roads in west Durham and to improve the flow of traffic on those roads be considered as an alternative to an extension of the expressway. NCDOT has indicated that they will consider only limited isolated improvements to roads in west Durham rather than a full range of alternative actions.

6. Because of the lack of a study of alternatives by NCDOT the Durham City Council directed its own staff to study alternative road networks in west Durham. That study is being released by the City next week. Using data supplied by NCDOT the City staff has generated several plans which appear economically and technically feasible assuming the validity of this data.

7. Despite the facts that NCDOT had not yet issued an approved EIS and that they had not made a comprehensive study of alternatives, both the project director and project engineer for the proposed extension have made public statements that the extension of the expressway is the only solution for west Durham traffic.

8. NCDOT has failed to facilitate public participation in the planning of the project. In January 1978 NCDOT held three neighborhood meetings in Durham for the ostensible purpose of obtaining public input into the proposed East/West Extension. However, at these meetings NCDOT presented only a map of the proposed extension and did not include any discussion or possibility of alternatives.

9. In addition to deterring public participation in this project, NCDOT has engaged in extensive private planning sessions with an institution and a business in Durham. At the request of the institution an interchange on the proposed extension was relocated. NCDOT did not make these meetings known to the public. Also, NCDOT knew that the residents of Crest Street were interested in expressway plans but they were not notified of these meetings.

10. NCDOT has also deliberately attempted to prevent a full public discussion of the proposed extension of the East/West Expressway. In a memorandum from the project director, he states regarding the East/West Expressway:

> "The extension of Anderson Street and the related improvements to the street system of the area can be handled either as a part of the East-West Freeway Project or as a separate project. The extension

of Anderson Street could be considered as a logical part of the freeway project since it replaces Trent Drive as the North/South artery for this area. If the extension is made part of the freeway project, it would displace businesses and residences and affect a neighborhood not previously affected by the freeway. By involving an additional neighborhood in the freeway project there is the possibility of increasing the controversy of the entire project. The project is already controversial enough without adding any additional opposition.

Therefore, it is my opinion the Anderson Street Extension and related improvements should be handled as a separate project." (Page 2 of Memorandum; a copy of this memorandum is attached as Exhibit 1).

11. NCDOT is also preventing full public discussion of this issue by their understatement of the relocation problems that would be created by the extension of the expressway. In their relocation report (copy attached as Exhibit 2), they state that sufficient housing for a large number of low income relocatees will be available from the Durham Housing Authority. Citing the fact that the Durham Housing Authority manages approximately 2400 units they omit that there is presently a waiting list of almost 1000 persons for that housing. Thus, their conclusion that additional housing will not be needed is erroneous. They also state that there is not a significant number of elderly families in this area. In fact, a large number of the residents in Crest Street Community are elderly.

DISCRIMINATION AGAINST MINORITIES

1. Construction of the East/West Expressway from Erwin Road to 15-501 would displace a disproportionately large number of blacks. While less than one third of Durham is black according to the 1970 census, almost all of the approximately 250 persons who would be displaced are black.

2. Displacement in this case would work special hardships. Most of these people are low-income renters. They would have difficulty finding any housing in Durham's tight housing market even with relocation assistance. The reduction of Durham's low-income housing stock by more than a hundred homes due to the construction of the Expressway would exacerbate this housing shortage. When the renters' relocation benefits ended they would be tossed back into a housing market with no vacancies.

3. The construction of this proposed extension of the expressway would also work a special hardship on these people because of the character of Crest Street Community. Recently an anthropologist at Duke University completed a year long study of the community. (A copy of this study is attached as Exhibit 3). The anthropologist's findings show a cohesive neighborhood often described as a large family. In fact, kinship ties runs strong in the community. The community was built around the New Bethel Baptist Church which is entering its centennial year. In 1964 the community, with assurances that the building site was safe from the expressway plans, constructed a beautiful new church. The proposed right of way has been changed. Now this church would be destroyed. Other cohesive black neighborhoods have been disrupted by the construction of early parts of this expressway. The present plans for construction from Erwin Road to 15-501 would continue this discrimination against black neighborhoods.

4. The residents of Crest Street Community are also victims of another type of racial discrimination by NCDOT. From 1915-1973 final decisions on NCDOT projects were made by the N. C. Highway Commission. This body made all of the decisions to date regarding the East/West Expressway. In the entire history of this commission every member was a white male; all blacks were excluded. This discrimination persists in the present NCDOT governing body. The N.C. Board of Transportation replaced the Highway Commission in 1973. Of the 24 members on the current board, only two of these members are black. Blacks compose one-fourth of the North Carolina population, according to the 1970 census.

5. This discrimination is also present in the highway planning and research staff. There were no black engineers or planners until this decade. Today only four percent of this staff is black.

6. This exclusion of blacks from critical planning and policy positions has adversely impacted the complainants in that persons familiar with and representative of black communities and people have been excluded from the decision-making process. This has resulted in projects such as this proposed extension of the expressway which have a disproportionately adverse impact on blacks.

7. This history and continuing employment discrimination against blacks in NCDOT takes on additional significance in light of the deficiencies in the present data and the lack of a serious study of alternatives today. By failing to engage in a continuing transportation planning process, NCDOT has adopted without evaluation a project planned at a time when blacks were totally excluded from the decision-making process.

8. NCDOT's discrimination by refusing to re-evaluate plans or consider alternatives is made complete by their position on funding. NCDOT has indicated that it would be unwilling to fund any alternatives to the expressway. Instead, they threaten to return the money earmarked for the expressway to the general fund and place any request for funding an alternative at the bottom of a crowded project list. The proposed extension is a primary-aid project and these funds could easily be transferred to urban funds and used to finance many alternatives. NCDOT's position on funding discriminates against complainants by precluding any alternatives that, unlike the proposed project, would not have a disproportionately heavy impact on blacks.

9. Finally, NCDOT has discriminated against complainants by the selection of projects and the location of projects in Durham. The 1967 Durham thoroughfare plan included a roughly designated corridor for a Southern Freeway in Durham. This project was studied in depth during 1969-71. In 1973 Harland Bartholomew and Associates issued a report on this project. They concluded that the need for the Southern Freeway in South Durham was clearly established. This project was never built, however. Instead, due to the opposition of white neighborhoods in Southern Durham the proposal was killed. In contrast, NCDOT has been unresponsive to the concerns of complainants. Complainants have actively opposed this project for twenty years. This year, after complainants protested vigorously at a neighborhood meeting held by NCDOT in January, NCDOT's response was to prepare "alternatives" which were mere shifts of the existing alignment by approximately 140 feet. During the City

Council meeting at which NCDOT presented these different alignments it became apparent, and NCDOT acknowledged, that they had not investigated the geographic extent of the community nor had they made an on-site inspection to determine the impact of these alignment shifts. In fact, these shifts saved few community homes and brought many of the finest owner-occupied homes in the community into the right-of-way. These actions illustrate the discriminatory manner in which NCDOT has responded to black and white neighborhoods in Durham.

ADMINISTRATIVE CLAIMS

The complainants assert the following administrative claims with respect to the actions of NCDOT:

I. *NCDOT has failed to engage in a continuing comprehensive planning process in violation of 23 USC § 134(a), DOT regulations and DOT policy memorandum.*

A. DOT regulations implement 23 USC § 134(a). These regulations, at 23 CFR 450, require, *inter alia,* that NCDOT engage in appropriate technical activities. The details of this requirement are fleshed out in DOT policy and procedure memorandum 50-9. Sections 5(d) and (e) specify the extensive data collection needed for a continuing comprehensive planning process. Section 4(c) of this memorandum states " . . . transportation plans should be re-evaluated and updated when necessary, but not less frequently than every five years." The Durham thoroughfare plan has not been updated in eleven years. Also, the revision in progress does not include the data specified in this memorandum, particularly the travel pattern data in Section 5(e).

B. NCDOT has also failed to bring in citizen participation as required by 23 CFR 450.120(a)(3) and Section 6 of PPM 50-9.

C. Pursuant to DOT Instructional Memorandum 50-3-71, a recipient must comply with PPM 50-9 to have its 3C process certified. NCDOT's violations of PPM 50-9 mandate the withholding of this certification.

D. DOT Regulation 450.120(2) requires that the 3C planning be co-ordinated with air quality planning under the Clean Air Act, 42 USC § 1857. Such coordination is impossible in the Durham area due to the absence of current traffic data or throughfare plan. Durham is presently waiting for monitoring results to determine if recent data finding Durham a non-attainment area was valid.

II. *NCDOT has failed to comply with the Action Plan requirements in violation of 23 USC § 109(h), DOT regulations and DOT policy memorandum.*

A. The N.C. Action Plan reiterates many of the program planning requirements above, including data collection, thoroughfare planning, and citizen participation. (N.C. Action Plan, pp. 40-43). As shown above, these elements have not been met in the instant case.

B. The N.C. Action Plan also specifies many project planning procedures. Perhaps the most critical of these is the comprehensive study of a broad range of alternatives. (N.C. Action Plan p. 74). In this case NCDOT has neither engaged in such a study nor collected the data necessary to do so.

C. NCDOT has omitted relevant portions of this highway project from its draft EIS in fear of arousing

controversy. This is a violation of NEPA, 42 USC § 4331 *et seq.*, which requires a full disclosure of the impact of a proposed action. Staff members of NCDOT have also violated NEPA by making recommendations of this project *before* the completion of the EIS process. These actions, in addition to violating NEPA, are violative of the EIS requirements of the N.C. Action Plan and DOT regulations at 23 CFR 771.

D. The draft EIS perpared by NCDOT is deficient in that: (1) it does not contain a study of a broad range of alternatives as required by NEPA and 23 CFR 771.18(j); it does not discuss the impact of the Anderson Street extension that was omitted in fear of generating controversy in violation of 23 CFR 771.18(i); and it does not assess the impacts of relocation and the impact on the elderly as required by 23 CFR 771.18(i)(2)(i) and (ii). For these reasons the FHWA Division Administrator should refuse to approve the draft EIS for release at this time.

III. *NCDOT has racially discriminated against complainants in violation of Title VI of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968 and 49 CFR 21 by proposing to extend the East/West Expressway through the Crest Street Community.*

A. Section 21.7 (d) of 49 CFR prohibits a recipient from locating a facility if the purpose or effect is to discriminate against any individuals on the grounds of race. The present proposed location of the extension of the East/West Expressway has such an effect and is thus violative of this section.

B. Title VIII of the Civil Rights Act of 1968 guarantees the right to equal housing opportunities, without regard to race. In order to assure this equal opportunity the East/West Expressway must not be extended through Crest Street Community. The resulting displacement of hundreds of minority persons and the destruction of over a hundred units of low income housing would prohibit the members of Crest Street Community and other low-income persons in Durham from exercising these rights. Additionally, housing includes more than the physical structure. The residents of Crest Street Community live in a supportive, close neighborhood. Title VIII protects their right to remain there.

C. NCDOT's long-standing plans to level this neighborhood have prevented private funds and government funds, particularly Community Development funds, from being invested in the community. This deprivation has continued over the last twenty years. Such actions by NCDOT are violative of complainants rights under Title VIII.

D. The past and present employment practices of NCDOT regarding the planning and research staff of the Division of Highways and the selection of members of the Highway Commission and Board of Transportation excluded and still exclude blacks and this practice excludes the interest of black people from the highway decision-making process. This is violative of 23 CFR 21.7(c)(3) which prohibits such employment discrimination.

E. The refusal of NCDOT to gather data to update the thoroughfare plan, to integrate the East/West Expressway proposal into an updated thoroughfare plan, to study alternatives, and to make funding available for such

alternatives perpetuates the past discriminatory employment and facility location actions and accentuates the present such actions of NCDOT. These actions are in complete opposition to the affirmative action requirements of 23 CFR 21.5(b)(7). When as in this case, past discriminatory actions have been committed, a recipient is required to remove or overcome these effects. In this case, this can only be done if NCDOT is prohibited from constructing the East/West Expressway through the Crest Street Community.

WHEREFORE, based on the claims and facts set forward, complainants pray for relief from the Department of Transportation as follows:

1. That NCDOT be prohibited from planning or constructing the proposed extension of the East/West Expressday through the Crest Street Community.

2. That NCDOT be required to offer funding for alternatives which would not destroy the Crest Street Community;

3. That NCDOT be required to correct the discriminatory practices in employment and the selection of members of the Board of Transportation;

4. That NCDOT be required to take necessary steps to eliminate the discriminatory location of facilities and that such steps be monitored by DOT;

5. That DOT withdraw the 3C certification for the Durham urban area and order and monitor the implementation of a corrective program;

6. That DOT withdraw approval of the N.C. Action Plan and its implementation until corrective measures are completed by NCDOT;

7. That the Division Administrator not approve the NCDOT draft EIS for this project until it is brought into compliance with the applicable statutes, regulations and memorandum;

8. That DOT conduct hearings in Washington, D.C. with all named defendants within sixty (60) days after receipt of this complaint in order that the claims herein stated may be resolved; and

9. That DOT grant any other administrative relief to which complainants are entitled.

NORTH CENTRAL LEGAL ASSISTANCE PROGRAM

Attorneys for Complainants
Durham, North Carolina

s/ By Michael D. Calhoun

s/ By Alice A. Ratliff

EXHIBT NO. 1
(to Exhibit A)

November 7, 1977

MEMORANDUM TO: W. F. Caddell, Jr.
FROM: R. F. Smith
SUBJECT: Durham, Anderson Street Connector

On September 6, 1977 the Durham City Council passed a resolution requesting the N. C. Department of Transportation extend Anderson Street from Hillsborough Road to Oakland Avenue as part of the East-West Freeway project (see figures 1 & 2.)

The Trent Drive-Oakland Avenue corridor presently serves as a major access route from the rsidential area north of Hillsborough Road to Duke University and V. A. Hospital which are major employment centers.

With the present street system, Trent Drive provides a continuous connection between the residential area and these employment centers crossing both Hillsborough Road and the Southern Railway tracks. The present design of the East-West Freeway (Figure 2) includes the termination of Trent Drive. Therefore without the Anderson Street extension, there would not be a continuous connection from the residential area north of Hillsborough Road to the area south of the railroad. Anderson Street is the only street that crosses both the railroad and the freeway between Erwin Road and Hillandale Road. Anderson Street crosses the railroad tracks at grade while both Erwin Road and Hillandale Road are grade separated.

The Anderson Street extension is shown on the mutually adopted Durham Thoroughfare Plan, being designated a minor thoroughfare.

The Hillandale Road extension, which is part of the proposed freeway plans, will provide a new connection between the residential area north of Hillsborough Road and the Duke V. A. Hospital complex. It will serve the western part of the residential area, and will relieve some of the traffic burden now using Trent Drive.

In order to eliminate two five point intersections, the Traffic Engineering Division of the City of Durham proposed the realignment of Warner Street and Alabama Avenue as shown on Figure 1. In addition, Anderson Street should be widened to 40 feet face to face of curbs between Main Street and Hillsborough Road. Approximately half of this widening is proposed to be done by the freeway project even if the extension is not built. The proposed cross section for the extension is 40 feet face to face of curbs also.

The total cost of the Anderson Street extension, the widening of Anderson Street, and the realignment of Warner Street and Alabama Avenue is estimated to be $326,100. The estimated construction cost is $74,600 and the estimated right-of-way cost is $251,500.

The extension of Anderson Street would necessitate the relocation of 3 businesses and 1 residence, and the realignment of Warner Street would relocate 1 additional residence.

The extension of Anderson Street and the related improvements to the street system of the area can be han-

dled either as part of the East-West Freeway project or as a separate project. The extension of Anderson Street could be considered as a logical part of the freeway project since it replaces Trent Drive as the north-south artery for this area. If the extension is made part of the freeway project, it would displace businesses and residences and affect a neighborhood not previously affected by the freeway. By involving an additional neighborhood in the freeway project there is the possibility of increasing the controversy of the entire project. The project is already controversal enough without adding any additional opposition.

Therefore, it is my opinion the Anderson Street Extension and related improvements should be handled as a separate project.

Please let me know as soon as a decision is made on this matter because we plan to begin our public meetings this month.

RFS/dc

EXHIBIT No. 2
(To Exhibit A)

RELOCATION REPORT—*E.I.S. CORRIDOR, DESIGN*
(Circle* type report)

N.C. Board of Transportation
Relocation Assistance

Instructions: Prepare an original and 2 copies

Work Order Number—9.8050560; F.A. Project Number .....; County, Durham; Alternate 1 of 1; Alternates .....

Description of Project: Durham East-West Freeway (Crest Street Area); N.C. Dept. of Transportation.

ESTIMATED DISPLACEES

Type of Displacees	Owners	Tenants	Total	Minority
Individuals	#3	17	20	20
Families	39	68	107	107
Businesses	0	1	1	1
Farms	0	0	0	0
Non-Profit Organizations	1	0	1	1

Income Level			Value of Dwelling		
0-4M	4-8M	8+M	60.00 0-6M	110.00 6-15M	111.00+ 15+M
10	7	3	0	6	14
28	66	13	0	45	62

DSS DWELLINGS CURRENTLY AVAILABLE

	60.00 0-6M	110.00 6-15M	111.00+ 15+M
Sale	0	5	147
Rent	0	36	36

*Circled answers are indicated in italic.

ANSWER ALL QUESTIONS AND EXPLAIN
ALL "YES" ANSWERS

1. Will project have significant impact *YES*—NO
2. Will project be disruptive to community *YES*—NO
3. Will community be cut off from services YES—*NO*
4. Will neighborhoods be separated YES—*NO*
5. Will special relocation services be necessary *YES*—NO
6. Will schools or churches be affected by displacement *YES*—NO
7. Will business relocation be detrimental to community YES—*NO*
8. Will business services still be available after project *YES*—NO
9. Have local officials, social agencies, housing officials, community groups been contacted *YES*—NO
10. Will relocation cause a housing shortage YES—*NO*
11. Source for housing available
12. Will additional housing programs be needed YES—*NO*
13. Should Last Resort Housing be considered YES—*NO*
14. Is there a significant number of large families, disabled, elderly, etc. on project YES—*NO*

ANSWER THESE ALSO FOR DESIGN

15. Will public housing be needed for project YES—NO
16. Is Public Housing available YES—NO

17. Is it felt there will be adequate DSS housing available during relocation period YES—NO
18. Will there be a problem of housing within financial means YES—NO
19. Are suitable business sites available (List Source) YES—NO
20. Number months estimated to complete relocation

RELOCATION AGENT
s/ Alfred F. Morris

DATE
6/26/78

FORM 15.4
Rev. 3-77

REMARKS:

(Number Response)

1. & 2. It is felt that the project will have significant impact and will be disruptive to the Crest Street Area. The project will cause displacement of a large number of low income Blacks and will nearly cause the displacement of the whole community. It is also felt that the highway project will inable the displacees the opportunity to live in safe, decent, and sanitary housing for the first time.

5. It is felt that as the results of the large number of low income families and individuals, special services from the social services in in house-keeping and money management.

6. The project will cause the displacement of one church which appears to serve as a leader for community activities.

8. The East-West Freeway will not be disruptive or adversely affect the businesses offering services to the community.

9. Mr. Ben T. Perry, Director of the Redevelopment Commission of the City of Durham; Patricia Wearing of the

Durham Housing Authority; Mr. J. H. Clark, Chairman of the Durham Board of Realtors; and Mr. Robert Peck, Durham's City Hall were contacted in reference to the Durham East-West Freeway and it appeared that the consensus opinion is that the Freeway is greatly needed to aide in the flow of traffic from the Duke-V.A. Hospitals.

11. The Durham Housing Authority has under management approximately 2400 housing units with a normal turnover rate of 8 to 10 per cent, from the local realtors and news papers it is apparent that adequate housing is and will be available.

APPROVED — DATE
s/ Lewis Allen — 7/6/78

Original and 1 copy—State Relocation Agent
2 copy—Area Relocation File

EXHIBIT B

OFFICE OF THE SECRETARY OF
TRANSPORTATION
WASHINGTON, D.C. 20590

FEB. 20, 1980

Mr. Thomas W. Bradshaw, Jr.
Secretary of Transportation
State of North Carolina
Raleigh, North Carolina 27611

Dear Mr. Bradshaw:

I am writing concerning our investigation of the Crest Street Community's complaint about the location of the proposed East-West Expressway in Durham as presented in the Draft Environmental Impact Statement. This complaint was filed with us pursuant to Title VI of the Civil Rights Act of 1964 which prohibits discrimination based on race, color or national origin in Federally-assisted programs.

The additional information you submitted in your letter of December 5, 1979 responding to my previous letter has been reviewed.

I understand that you have not made a final decision with regard to the preferred alternative location of the proposed highway. Nevertheless, I believe it important to inform you of our preliminary judgments concerning the alignment proposed in the Draft EIS and challenged by the Title VI complaint, so that you may take them into account in your future planning.

On the basis of all of the information that has been furnished to us, our preliminary conclusions are as follows:

(1) The proposed alignment which shows an interchange displacing virtually the entire Black community along Crest Street would entail extremely adverse and disproportionate impacts on Blacks as compared with Whites in the surrounding area in terms of displacement, relocation, and general community disruption.

(2) The identification and discussion of alternatives in your submitted materials, principally the Draft EIS appear inadequate as justification for such extreme, adverse racial impacts in light of transportation requirements.

(3) We are advised by John Hassell that there is at least one apparently reasonable and prudent alternative not explored in any of the present alternative analyses that would involve substantially less adverse impact on the Crest Street community and still respond to your transportation requirements.

In view of the above preliminary judgments, we find reasonable cause to believe that the construction of the Expressway along the alignment proposed in the Draft EIS would constitute a prima facie violation of Title VI and, in particular, Section 21.5(b)(3) of our Departmental Title VI regulation which provides:

> "In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding persons from, denying them the benefits of, or subjecting them to discrimination under any program to which this regulation applies, on the grounds of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this part." -49 CFR 21

John and I will be happy to discuss this matter with you.

Sincerely,

ORIGINAL SIGNED BY
Ellen Feingold
Director of Civil Rights

cc: Michael Calhoun, Esq.

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DSTRICT OF
NORTH CAROLINA
DURHAM DIVISION

File No. C-352-D-72

ECOS, INC.; DREW DIEHL; ASSOCIATED STUDENTS OF DUKE UNIVERSITY; STEVE SCHEWEL and HENRY BECK, Members of Associated Students of Duke University; and JOHN ROBERTSON,

Plaintiffs

v.

CLAUDE S. BRINEGAR, Secretary of the United States Department of Transportation; T. J. MORAWSKI, Division Engineer, Federal Highway Administration; McLAUCHLIN D. FAIRCLOTH, Commissioner, North Carolina State Highway Commission; W. F. CADDELL, JR., Planning and Research Engineer, North Carolina State Highway Commission; and NELLO TEER COMPANY, A Corporation,

Defendants

CREST STREET COMMUNITY COUNCIL, INC. and WILLIE PATTERSON, Applicants for Intervention

MOTION TO INTERVENE

CREST STREET COMMUNITY COUNCIL, INC. and WILLIE PATTERSON, proposed plaintiffs-intervenors (hereinafter intervenors), respectfully move the Court pursuant to Rule 24(a)(2) and Rule 24(b)(2) of the Federal Rules of Civil Procedure for an Order allowing them to intervene as plaintiffs in the action identified above. Their proposed complaint is attached. The grounds in support of this motion are as follows:

1. The intervenors have a direct interest in this action.

2. The intervenors' ability to protectect their interests will be impaired if intervention is not allowed.

3. The interests of the intervenors may not be adequately represented by the plaintiffs in this action.

4. Intervenors' claims and the claims of the present plaintiffs present common questions of law and fact.

5. Allowing intervention will not unduly delay or prejudice the adjudication of the rights of plaintiffs and defendants in this action.

6. The existing case in which intervention is sought has been dormant for several years and thus the department structures and individual officials have changed. If the substitution of the current proper officials is not made prior to intervention, intervenors will move for such substitution after intervention. Also, defendant Nello Teer Company, a highway contractor, has completed the section of the Expressway in dispute when this case was previously active and no contract has been let for the presently proposed extension of the Expressway. Plaintiffs Crest Street Community Council, Inc. and Willie Patterson have no claims against Nello Teer Company at this time.

7. This motion for intervention is timely.

WHEREFORE, intervenors request that they be permitted to intervene in this action as of right pursuant to Rule 24(a)(2), or. in the alternative, that they be allowed permissive intervention in accordance with Rule 24(b)(2).

This the 15 day of October, 1982.

NORTH CENTRAL LEGAL ASSISTANCE PROGRAM
Durham, North Carolina
ATTORNEYS FOR INTERVENORS

s/ By Michael D. Calhoun

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA
DURHAM DIVISION

File No. C-352-D-72

CREST STREET COMMUNITY COUNCIL, INC. and WILLIE PATTERSON,

Plaintiffs-Intervenors

ECOS, INC.; DREW DIEHL; ASSOCIATED STUDENTS OF DUKE UNIVERSITY; STEVE SCHEWEL and HENRY BECK, Members of Associated Students of Duke University; and JOHN ROBERTSON,

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Defendants

COMPLAINT

INTRODUCTION

1. This is a complaint by a black neighborhood through its neighborhood organization and by a resident of the neighborhood to prevent its displacement and destruction by the unlawful and illegal extension of the Durham East/West Expressway by the North Carolina Department of Transportation with federal-aid highway funds.

PARTIES

2. Plaintiff-intervenor Crest Street Community Council, Inc. is a not for profit corporation, incorporated

under the laws of North Carolina and located in Durham, North Carolina. Its membership is composed of the residents of the Crest Street Community, a black neighborhood in the western part of Durham, North Carolina.

3. Plaintiff-intervenor Willie Patterson is a resident of the Crest Street Community. His residence lies in the right of way of the proposed extension of the East/West Expressway.

4. Defendants are officials of the United States Department of Transportation, Federal Highway Administration and the North Carolina Department of Transportation with the authority and responsibility to implement the highway construction programs under which it is proposed that the East/West Expressway be extended.

JURISDICTION

5. This Court has jurisdiction of the parties and subject of this action under 28 U.S.C. §§ 1331, 1337, 1361 and 1343(3) and (4).

FACTS

6. The Crest Street Community is a stable, low-income/moderate-income black community in west Durham. The neighborhood, which is more than 100 years old, is held together by family ties. An anthropological study of the Community, conducted and published by Duke University, found that the majority of residents in the neighborhood have lived in the Community for more than 20 years and had relatives in other households in the neighborhood. The Crest Street Community is the only remaining black neighborhood in west Durham.

7. The North Carolina Department of Transportation proposes to extend the Durham East/West Expressway from its current terminus at Erwin Road to U.S. 15-501.

8. The North Carolina Department of Transportation is proceeding with extension of the expressway as a federal-aid primary road project under 23 U.S.C. § 108. Seventy-five percent (75%) of the funding for the expressway would be federal funding.

9. The North Carolina Department of Transportation has issued a final Environmental Impact Statement for extension of the expressway and the Federal Highway Administration and the United States Department of Transportation have approved this Environmental Impact Statement.

10. The North Carolina Department of Transportation plans to begin extension of the expressway in this calendar year. However, no contacts have been put out for bid or let on this project.

11. Extension of the East/West Expressway as currently proposed by the North Carolina Department of Transportation would destroy the Crest Street Community and an interstate connecting freeway would be placed through the middle of the community, displacing move than half of the 200 households. The remaining households would face displacement pressure from commercialization and would be left in a noisy, polluted environment.

12. Each of the allegations in paragraphs one through eleven above are incorporated by reference in each of the following claims for relief.

FIRST CLAIM FOR RELIEF

13. Extension of the East/West Expressway would be done with the intent and effect of violating the civil

rights of the residents of the Crest Street Community in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 *et seq.* and United States Department of Transportion Regulations, 49 C.F.R. 21.

SECOND CLAIM FOR RELIEF

14. The defendants are proceeding with extension of the East/West Expressway without providing plaintiffs requ ed relocation benefits, in violation of the Uniform Relocation Assistance and Real Properties Acquisitions Policies Act of 1970, 42 U.S.C. § 4601 *et seq.*

THIRD CLAIM FOR RELIEF

15. The expressway extension takes several park lands notwithstanding the availability of prudent and feasible and non-expressway alternatives and expressway corridors, in violation of 23 U.S.C. § 138.

FOURTH CLAIM FOR RELIEF

16. The defendants have failed to prepare an adequate environmental impact statement, in volation of the National Environmental Policies Act, 42 U.S.C. § 4331 *et seq.*

FIFTH CLAIM FOR RELIEF

17. The defendants are proceeding with extension of the expressway without having engaged in a continuing comprehensive planning program as required by 23 U.S.C. § 128.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray that this Court:

A. Issue a preliminary and permanent injunction against defendants, their successors in office and their agents or employees and all other persons in concert with them, prohibiting them from proceeding with the extension of the East/West Expressway through the Crest Street Community Nighborhood.

B. Declare on behalf of plaintiff that the acts and practices of the defendants in proceeding with the extension of the East/West Expressway through the Crest Street Community Neighborhood violate Title VI of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968, 49 C.F.R. § 21, the Uniform Relocation Assistance and Real Properties Acquisition Policies Act of 1970, 23 U.S.C. § 138, and 23 U.S.C. § 128.

C. That the defendants be ordered to pay plaintiffs' attorney fees and costs.

D. For such other and further relief to which the plaintiffs are entitled.

This the — day of ————, ——.

NORTH CENTRAL LEGAL ASSISTANCE PROGRAM
Durham, North Carolina
ATTORNEYS FOR CREST STREET COMMUNITY COUNCIL, INC. and WILLIE PATTERSON

s/ By Michael D. Calhoun

EXHIBIT D

NORTH CAROLINA
DURHAM COUNTY

FINAL MITIGATION PLAN

This is an agreement between City of Durham (hereafter "City"), the North Carolina Department of Transportation (hereafter "NCDOT") and the Crest Street Community Council, Inc. (hereafter "Council"). The date of this agreement is December 15, 1982.

PREAMBLE

The City has requested, and it is planned by NCDOT, that the Durham East/West Expressway be extended to U.S. 15-501 Bypass. Extension of the Expressway will displace much of the Crest Street Community (hereafter "Community"), a long-standing cohesive black neighborhood. For many years the Community opposed the extension of the Expressway and in 1978, filed an Administrative Complaint with the United States Department of Transportation (hereafter "USDOT") alleging, *inter alia,* that extension of the Expressway would violate their civil rights under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000(b), and Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601 *et seq.* In February, 1980, the Civil Rights Office of USDOT issued a preliminary finding that extension of the Expressway as planned would violate the civil rights of the residents of the Community. In addition the USDOT urged NCDOT, the City and the Council to meet to determine if their disagreements could be conciliated and resolved. Through negotiations among representatives of the City NCDOT, Federal Highway Administra-

tion (hereafter "FHWA") and the Council, a plan was developed for specified steps to be taken to reduce adverse impacts on the Community, which may result from the extension of the East/West Expressway under the proposal designated as "Expressway Alternative F-6 Revised." The Council agreed to withdraw its Administrative Complaint if the City and NCDOT agreed to implement these mitigation efforts. The City was originally required to contribute a significant share of right-of-way acquisition costs for the East-West Expressway Project. NCDOT then released the City from its obligation to pay an estimated 2.75 million dollars towards right-of-way costs of the Expressway, on the condition that the City participate in the mitigation efforts. On February 25, 1982, the City Council of the City of Durham approved a mitigation concept which contained the mitigation efforts developed by the representatives of the City, NCDOT, FHWA and the Council.

An injunction prohibiting NCDOT and USDOT from proceeding with construction of the extension of the Expressway, entered by the Federal District Court for the Middle District of North Carolina in the case of *ECOS, Inc., et al v. Secretary of U. S. Department of Transportation,* et al, C-352-D-72; currently remains in effect.

The City, NCDOT and the Council agree as follows:

1. *Implementation of Mitigation Plan.* The City and NCDOT shall implement the mitigation plan prescribed by this agreement within three years of the court's final dissolution of the injunction in the case of *ECOS, Inc., et al v. Secretary of U. S. Department of Transportation, et al,* C-352-D-72 (hereafter "the ECOS case").

2. *Dissolution of Injunction.* The Council shall support dissolution of the injunction in the ECOS case. This agreement is void if the court fails to dissolve said injunction.

THE MITIGATION PLAN

I. *Redevelopment Plan*

3. *Preparation of Redevelopment Plan.* The City shall prepare and consider adopting a Redevelopment Plan for the area shown on Exhibit C. The primary objectives of the redevelopment plan would be to provide replacement housing for Crest Street Community Residents and to establish a residential community with long term viability.

4. *Contents of Redevelopment Plan.* The Redevelopment Plan shall provide for the following:

a) A neighborhood park which shall include at least a baseball field, a lighted basketball court, picnic facilities, play apparatus, walkways, a water fountain and toilet facilities (as specified on Exhibit D);

b) A community center to be located in the auditorium of the Hickstown Elementary School.

c) Landscaping around the Duke Power Company substation which is presently located on Crest Street, in order to help screen the substation;

d) A site for a community store;

e) The site plan shown in Exhibit D.

5. *Consideration of Redevelopment Plan.* The parties recognize that the City must comply fully with the requirements of the Urban Redevelopment Law, G.S. 160A-

500 et seq, in order for the City to adopt and execute a redevelopment plan. Therefore, this agreement shall become void if a Redevelopment Plan which conforms to this agreement is not approved by the City on or before April 5, 1983 or if NCDOT determines within thirty (30) days of April 5, 1983 the Redevelopment Plan is not acceptable and rescinds the Municipal Agreement. The City agrees to consult with NCDOT and the Council prior to taking final action on such plan (including the site plan prescribed in paragraph 4 (e)) so that the views of NCDOT and the Council may be fully presented during the City's consideration of such redevelopment plan.

6. NCDOT and the City shall acquire all property in the Crest Street Neighborhood Area (which area is shown on Exhibit B) which may be necessary for the implementation of this agreement and the redevelopment plan described in paragraphs 3, 4 and 5 of this agreement. The responsibilities of NCDOT and the City for such property acquisition shall be prescribed in a Municipal Agreement (hereafter "Municipal Agreement") which shall be executed by and between NCDOT and the City contemporaneously with this agreement.

II. *Last Resort Housing*

7. *Basis for Last Resort Housing.*

a) The parties agree that the extension of the East/West Expressway cannot proceed unless a reasonable mitigation plan is developed which is acceptable to all of the parties. Since one of the primary objectives is to relocate the Community "as a community" and sufficient housing to accomplish this

objective is not available in the City of Durham, then the provision of last resort replacement housing is necessary to accomplish the desired end result.

b) The Federal authority and mechanism for last resort housing is Section 206(a) of P.L. 91-646 (42 U.S.C. 4601-4655, Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970). The State authority and mechanism for last resort housing is N.C.G.S. 133-10.1.

c) In order to accomplish the purposes of this agreement, NCDOT, the City and the Council agree that Community residents who are displaced by acquisition of property for the East-West Expressway and Fulton Street Redevelopment Areas shall be entitled to all the relocation assistance benefits (including last resort housing benefits) prescribed by Article 2 of Chapter 133 of the North Carolina General Statutes and implementing NCDOT regulations and procedures, as provided in this agreement.

8. *Last Resort Housing Provided.* The responsibilities of NCDOT and the City for providing relocation assistance are prescribed in the Municipal Agreement.

9. *Owner-Occupants.*

a) NCDOT and the City agree, subject to the limitation prescribed in paragraph 15, to pay to any displaced person who is displaced from a dwelling located within the boundaries of the Crest Street Community as shown on Exhibit B, which dwelling is actually owned and occupied by such displaced person for not less than 180 days prior to the initiation of

negotiations for the acquisition of such dwelling, the assistance prescribed in this paragraph 9; provided, however, that such displaced person shall purchase and occupy a replacement dwelling which is decent, safe and sanitary not later than the end of the one-year period beginning on the date on which he receives final payment of all costs of the acquired dwelling, or on the date on which he moves from the acquired dwelling, whichever is the later date:

(1) A last resort housing relocation assistance payment computed as follows:

(a) NCDOT will obtain a firm bid from a qualified contractor for replacement of the persons existing house and garage, if any, and any improvements required to bring the house into compliance with the Housing Code of the City of Durham;

(b) To the amount of the bid obtained under 1.(a) above shall be added the sum of $3,000, which shall be an allowance for a building lot;

(c) From the sum of 1.(a) and (b) above shall be subtracted the amount of the fair market value of the person's existing house, lot and garage (if any) but excluding any outbuilding, other than a garage, and extraordinary landscaping: the resulting amount is the payment required under this subparagraph (a) (1); and,

(2) A payment to offset any additional mortgage cost which may result from purchase

of a comparable replacement dwelling: this payment shall be determined in the manner prescribed by G.S. 133-9(a) (2).

b) The payments prescribed in subparagraph (a) of this paragraph are in addition to the payment of fair market value for the property acquired from such displaced person by NCDOT and/or the City.

c) The City and NCDOT agree to make available to any person described in subparagraph (a) of this paragraph, one lot located in the West Fulton Street Redevelopment Area, which area is shown on Exhibit E, at a cost to such person of $3,000; provided that the lot is purchased for the purpose of constructing a replacement house and said replacement house is subsequently constructed and occupied by such displaced person. Persons qualifying for purchase of such lots under this paragraph shall have priority for such purchase over all other persons. The priority of such persons qualifying for lot purchases under this paragraph shall be determined as to each other in the manner prescribed in paragraph 13 of this agreement.

d) It is understood by the parties to this agreement that the money to be paid as assistance to displaced persons under subparagraph (a) of this paragraph shall be held by NCDOT and shall be applied to the purchase of a house for such displaced persons pursuant to the requirements of subparagraph (a) of this paragraph. The assistance payable under subparagraph (a) is limited to the amount required for the purpose of purchasing a comparable replacement

house for such displaced person. Such displaced person may use the benefits payable under subparagraph (a) to purchase any house, provided the house is decent, safe and sanitary. If the cost of the replacement house exceeds the amount available to such displaced person under subparagraphs (a) and (b) of this paragraph, then such displaced person shall be responsible for paying such excess amount; if the cost of the replacement house is less than the amount available to such displaced person under subparagraphs (a) and (b) of this paragraph, then such excess amount shall belong to NCDOT. NCDOT agrees to arrange for the construction of a replacement house by contracting with a builder and making progress payments to the builder during construction provided however that the displaced person shall request such assistance from NCDOT and shall enter a suitable contract with NCDOT for the purchase of such house.

e) In lieu of receiving assistance under subparagraphs (a), (c) and (d) of this paragraph, any displaced person qualifying for such assistance may elect to participate in the program for tenants which is described in paragraph 11. It is understood that such displaced person may be assigned a lower priority for such tenant program than other persons qualifying for such program. The assignment of priority shall be made pursuant to paragraph 11(e) (2) and (3) of this agreement.

f) Every displaced person described in subparagraph (a) of this paragraph shall have first

priority to purchase the dwelling purchased from him by NCDOT and/or the City.

10. *Tenants.*

a) The City and NCDOT agree, subject to the limitation prescribed in paragraph 15, to pay to or for any displaced person displaced from any dwelling located within the boundaries of the Community as shown on Exhibit B, which dwelling was actually and lawfully occupied by such displaced person for not less than 90 days prior to the initiation of negotiations for acquisition of such dwelling, the assistance prescribed by this paragraph 10, provided however, any person receiving any benefit prescribed under paragraph 9 of this agreement, except subparagraph 9(b), shall not be eligible to receive the assistance prescribed under this paragraph. The assistance prescribed by this paragraph is a last resort housing relocation assistance payment equal to the difference between the rent currently being paid by such displaced person or 25% of such displaced persons' gross income, whichever is less, and the rent (excluding utilities) for a comparable dwelling in the new Section 8 townhomes located on Crest and Bass Streets, presently known as the Crestview Apartments (hereafter "Crestview Apartments"); provided, however, if the comparable dwelling is a size other than a two or three bedroom unit in the Crestview Apartments, then the rent for the comparable dwelling shall be calculated by the following formula:

$$R = S \times \frac{T}{U}$$

Where: *R* is the rent for the comparable unit,

S is the rent applicable to the comparable unit derived from the rent schedules (known as fair market rent schedules) of the United States Department of Housing and Urban Development (hereafter "HUD") for the City of Durham,

T is the rent for the dwelling unit in the Crestview Apartments which is nearest in size to the comparable unit, and

U is the rent for the nearest size comparable dwelling, according to the HUD fair market rent schedules.

The payment prescribed by this paragraph shall cover a period of 48 months and shall be based upon rents or rent schedules in effect at the time the person receiving such payment is displaced. The cost of utilities shall be excluded from the calculation of the payment prescribed by this paragraph.

b) The term "comparable dwelling", when used to compute the maximum benefit in paragraph 10(a), means a dwelling with the same number of bedrooms as the dwelling from which the person receiving the assistance prescribed by this paragraph is displaced, or a dwelling with a sufficient number of bedrooms to meet the needs of the displaced persons' family under applicable NCDOT regulations, whichever is larger.

11. *Subsidized Rental Dwellings.* The City and NCDOT agree, subject to the limitation prescribed in paragraph 15, to make subsidized housing available to dis-

placed persons who qualify for assistance under paragraph 9(e) or paragraph 10 of this agreement in the manner provided in this paragraph:

a) The City and the Council agree to exercise their rights under an existing contract with the developer of the Crestview Apartments to insure the availability of 45 dwelling units in such apartments for such displaced persons.

b)(1)(i) The City and NCDOT agree to assist the Council in filing an application with the federal government under Section 202 of the Housing Act of 1959, as amended, whereby the Council may receive a federal loan under such Act for the purpose of purchasing and developing the building currently known as the Hickstown Elementary School (hereafter the "Hickstown School") for rental housing (with individual cooking facilities), primarily for the elderly.

(ii) The City agrees to make a grant to the Council in an amount not to exceed $15,000 which grant shall be used by the Council for professional fees and other costs connected with the filing and processing of the application.

(iii) Further, if the federal government approves the application for the Sec. 202 loans the City shall make a grant to the Council in an amount equal to ½ of 1% of the amount of the HUD allowable project cost, provided however, said grant shall not exceed $7500.

(iv) Further, the City shall provide a grant to the Council in an amount equal to the difference

between the sum of the amount received from HUD under the Sec. 202 loans and the grant provided by the City pursuant to subparagraph (b)(1)(iii) of this paragraph and the costs of the acquisition and rehabilitation of the building, provided, however, that the plans for rehabilitation of the building shall be subject to review and approval by the City prior to the making of such grant.

(2) The City and NCDOT agree to assist the Community in filing an application with the federal government for rental subsidies through the moderate rehabilitation program under Section 8 of the Housing Act of 1937 as amended, in the event the federal government rejects the Council's Section 202 application (described in subparagraph b(1) above). The Council agrees that the purpose of such an application would be to purchase and develop the Hickstown School in the manner described in part (1) of this subparagraph. The City further agrees that upon the federal government's approval of said Section 8 moderate rehabilitation application, the City will make a loan, consistent with the City's Community Development Program to the Council in an amount equal to the difference between the cost of purchasing and developing said Hickstown School consistent with this subparagraph and the maximum amount obtainable by the Council from a lender, using said Hickstown School property and the rents therefrom as collateral, provided however, that the plans for rehabilitation of the building shall be subject to review and approval by the City prior to the making of such loan.

(3) The Council agrees to make rental units in such renovated Hickstown School available to the displaced persons described in this paragraph, consistent with subparagraph (e)(2) and (3) of this paragraph, should the Council receive a federal loan or other assistance under parts (1) and (2) of this subparagraph (b).

c) The City agrees to acquire the three (3) quadraplex units located at the north end of Nassau Street and to make such units available for purchase by the Council consistent with the Urban Redevelopment Law, G.S. 160A-500 et seq. The City and NCDOT further agree to make available for purchase by the Council pursuant to the Urban Redevelopment Law from among the structures purchased by the City pursuant to the redevelopment plan described in paragraphs 3, 4 and 5 and from the structures purchased by NCDOT for the East-West Freeway right-of-way, a sufficient number of residential structures and lots to house displaced persons, who qualify for assistance under this paragraph and who are not housed in the Crestview Apartments, the Hickstown School or the said Nassau Street quadraplexes. The City and NCDOT agree to assist the Council to make a moderate rehabilitation rental subsidy application to the appropriate authorities pursuant to Section 8 of the Housing Act of 1937, as amended, for the purpose of acquiring and developing said quadraplexes and other structures as residential rental units. The City agrees that upon approval by the federal government of the Community's Section 8 application, the City shall make a loan to the Community, consistent with the

City's Community Development Program, in an amount equal to the difference between the cost of acquiring and developing said quadraplexes and other structures in a manner consistent with this subparagraph and the maximum amount obtainable by the Council from a lender, using said quadraplexes and other structures and the rents therefrom as collateral, provided however, that the plans for rehabilitation of the building shall be subject to review and approval by the City prior to the making of such loan.

d) It is the intention of NCDOT, the City and the Council that the rental assistance provided under this paragraph shall be at a sufficient level so that during the first four years of occupancy following relocation of a displaced person into the rental housing provided under subparagraphs (b) and (c) of this paragraph the rents (excluding utilities charges) charged such displaced person for such rental housing will not exceed the lesser of the tenants current rent or 25% of his gross income, and thereafter (for a 16 year period with respect to rental housing provided under subparagraph (b) and for an 11 year period with respect to rental housing provided under subparagraph (c)) the rents (including utilities charges) charged such displaced person for such rental housing shall not exceed 30% of his gross income adjusted pursuant to current Section 8 program regulations. If, because of a change in program, or otherwise, the level of rental assistance should fall below the foregoing level, the provisions of paragraph 16 would be applicable as to the difference.

e)(1) The City and NCDOT agree that they will require, as a condition of sale of any structure described in subparagraphs (b) and (c) of this paragraph which the City or DOT may subsequently purchase, that the purchaser(s) thereof shall agree to give priority to residents of the Community, as shown on Exhibit B, in the manner prescribed by parts (2) and (3) of this subparagraph. The Council agrees that, should it become the owner or developer of any such structure, it shall give priority to residents of the said Crest Street Community in the manner prescribed by parts (2) and (3) of this subparagraph.

(2) The priorities applicable to part (1) of this subparagraph are as follows for initial occupancy of such structures:

(i) First priority shall be given to current residents who live south of the railroad;

(ii) Second priority shall be given to current residents who live north of the railroad; and

(iii) Third priority shall be given to prior residents who resided in the community area for at least five years.

(3) During the life of any federal program of assistance described in subparagraph a, b and c of this paragraph, but subject to the priorities for initial occupancy set forth in part (2) of this subparagraph, priority shall be given to persons who have resided for at least five years in the area of the Community which lies south of the railroad, as shown on Exhibit B.

12. *Tenant-Home Owner Conversion.*

a) The benefits for persons described in paragraph 10, may be used by any such person as a downpayment toward the purchase of a replacement home, provided, however such payment of benefits under paragraph 10 shall not exceed the minimum amount required by a lender as a downpayment for such replacement home. In order to qualify for assistance under this paragraph, such person must obtain financing for the balance of such persons cost of a dwelling or replacement home. This provision is implemented pursuant to G.S. 133-10.1 and therefore no matching downpayment shall be required of such person under G.S. 133-10(2).

b) The City and NCDOT agree to provide the assistance prescribed in this subparagraph to any person who is entitled to receive assistance pursuant to paragraph 10 of this contract and who shall elect to purchase a dwelling in the West Fulton Street Redevelopment Area (shown on Exhibit E):

(1) The City shall, as soon as possible, exercise its best efforts to make reduced interest rate mortgages available for such persons by means of a local credit agreement between the City and local lenders, whereby such local lenders would make mortgage loans to such persons at reduced interest rates. It is understood that the North Carolina Housing Finance Agency (hereafter NCHFA) must approve the local credit agreement and that the interest on monies borrowed by the City to support such mortgages must qualify as tax-exempt under the Mortgage Revenue Bond Act of 1980, commonly referred to as the Ullman

Act, in order for the reduced interest rate mortgages to be made available. The provisions of paragraph 16, concerning substitution of program/benefits, do not apply to this paragraph 12(b)(1).

(2) The City and NCDOT agree to make available to any such person, one lot located in the West Fulton Street Redevelopment Area, which area is shown on Exhibit E, at a cost to such person of $3,000; provided that the lot is purchased for the purpose of constructing a replacement home and such replacement home is subsequently constructed and occupied by such displaced person. Such person shall be assigned a priority for such lot in the manner prescribed in paragraph 13 of this agreement. Furthermore, the City and NCDOT agree to make available for purchase a relocated, rehabilitated unit by financially qualified tenants described in paragraph 12(a) who relocate into the West Fulton Street Redevelopment Area in said units.

(3) (i) The City agrees to provide to any such person a deferred second mortgage, the proceeds of which shall be applied to the purchase of either a new or a relocated, rehabilitated existing dwelling in the West Fulton Redevelopment Street Area, provided, however, that such person shall first obtain from a lender a first mortgage in the maximum amount such lender will lend provided that the resulting housing costs do not exceed 25% of such persons' adjusted gross income. The deferred second mortgage shall be used as a supplement to the first mortgage and to the last resort housing relocation payment prescribed in sub-

paragraph (a) of this paragraph in the purchase of such dwelling.

(ii) The terms of the deferred second mortgage shall include the following: first, that no mortgage payment is required of the mortgagor until the property is sold at which time payment of the full amount shall be due; and second, no interest shall accrue on the mortgage until the date payment becomes due. The death of the mortgagor does not constitute a sale of the property. The lease of the property by the mortgagor or his successor in interest for five years or more, which term shall include all prior leases and any option to renew or extend such lease, constitutes a sale of the property. The City may require any lawful interest to be paid on the amount of the mortgage after the date payment of the mortgage amount is due.

(iii) The maximum amount of the deferred second mortgage available to each such person shall be determined as follows: for the purchase of a newly constructed dwelling, the maximum amount of the deferred second mortgage shall be $10,000 or the amount necessary to reduce such persons' housing costs to 25% of adjusted gross income, whichever is less; and, for purchase of a relocated, rehabilitated existing dwelling, the maximum amount of the deferred second mortgage shall be $6,000.00 or the amount necessary to reduce such persons' housing costs to 25% of adjusted gross income, whichever is less. Housing costs include mortgage payments, taxes and in-

surance on the property but exclude the costs of utility service. Adjusted gross income is computed by subtracting from the gross family income $600.00 for each dependent and an amount equal to 5% of the gross family income for a spouse residing in the residence.

(4) It is agreed that any person receiving a reduced interest mortgage loan under paragraph 12(b)(1) or a deferred second mortgage under paragraph 12(b)(3) for the purchase of a new or relocated, rehabilitated dwelling in the West Fulton Street Redevelopment Area shall, as conditions of receiving either or both of such mortgages, allow the City or NCDOT to contract for the construction of such dwelling and sign a contract with the City or NCDOT wherein such person agrees to purchase such dwelling.

(5) NCDOT and the City shall provide the following additional assistance to any such person who shall purchase a relocated, rehabilitated dwelling in the West Fulton Street Redevelopment Area. The City will provide to such person the rehabilitation assistance set forth in the City's Rehabilitation Financing Handbook. A copy of such handbook is Attachment 1 of this agreement. Prior to sale of any such dwelling to such person, the City shall rehabilitate the structure in accordance with the City's Rehabilitation Contractor's Handbook. A copy of such handbook is Attachment 2 of this agreement. NCDOT agrees to sell such relocated, rehabilitated dwelling to such person for an amount equal to the sum of the value, if any, of the structure (determined by NCDOT's retention value appraisal) plus the price of the lot, plus the

cost of moving the structure, plus the foundation cost, plus the purchaser's share of the rehabilitation cost, plus the cost of typical property improvements such as driveways, walkways and landscaping plus the cost of any other property improvements. NCDOT shall apply any relocation payments which such person is entitled to receive first to acquisition, lot, moving and foundation costs and thereafter to the such person's share of the rehabilitation costs.

III. *Other*

13. *Priority on Sale of Dwellings.* NCDOT, the City and the Community agree that, within a reasonable time after the execution of this agreement, they will establish, by subsequent agreement, objective criteria by which persons who are eligible to purchase lots and new or relocated, rehabilitated dwellings in the West Fulton Street Redevelopment Area shall be assigned priority in the purchase of such lots and dwellings. Such criteria shall be consistent with the provisions of paragraphs 9(c), 9(f) and 11(e) of this agreement.

14. *Noise Abatement Wall.* NCDOT shall construct, at its own cost, a noise abatement wall along the southernmost right-of-way limits of the East-West Freeway between LaSalle Street and the Hillandale-Fulton Street Connector and along the westernmost right-of-way limits of the Hillandale-Fulton Street Connector between the East-West Freeway and the northern property line of the Veterans Administration Hospital property. NCDOT shall also provide landscaping for the noise abatement wall.

15. *Assistance Limited.* Notwithstanding any other provision(s) of this agreement, residents of the Crest

Street Community who live north of the railroad and any prior resident of the community shall not be entitled to receive any assistance, payment, privilege or right under this agreement except that such persons may have the priority for occupancy in subsidized rental housing prescribed by paragraph 11(e)(2) of this agreement.

16. *Substitution of Program/Benefits.* If a program or benefit becomes unavailable, due to events such as termination of a federal program, a replacement program or benefit with at least equivalent benefits will be provided from another available source. This paragraph does not apply to the assistance prescribed by paragraph 12(b)(1).

17. *Non-displaced Homeowners.* The City agrees to provide to any person who owns and occupies a dwelling in the West Fulton Street Area, as shown on Exhibit E, whose dwelling is not acquired pursuant to the redevelopment plan described in paragraphs 3, 4 and 5, the rehabilitation assistance set forth in the City's Rehabilitation Financing Handbook (Attachment I of this agreement).

18. *Exhibits.* The Exhibits of the Municipal Agreement which are referred to in this agreement and attachments 1 and 2 are incorporated into this agreement by reference.

19. *Community Store.*

a) The City agrees to make available for purchase by or exchange with the owner of the community store presently located at 2304 Crest Street, consistent with the Urban Redevelopment Law, the site referred to in paragraph 4(d). NCDOT agrees to make available for purchase by said community store

owner a relocated structure for an amount equal to the sum of the value, if any, of the structure (determined by NCDOT's retention value appraisal). The store owner will be responsible for the cost of moving the structure, the foundation cost, the cost of any property improvements such as driveways, walkways and landscaping, and any other property improvements.

b) In lieu of the promises contained in subparagraph (a) of this paragraph and at the election of the said present community store owner, the City agrees to temporarily lease to said present community store owner, a relocated structure on the site described in paragraph 4(d), consistent with the Urban Redevelopment Law, for use by said present community store owner as a community store.

20. *Grant and Loan Contracts.* It is understood by the parties that the grants and loans referred to in paragraph 11 which will be made by the City to the Council are grants and loans made pursuant to G.S. 160A-456 and that said grants and loans must be for the purpose of providing for the rehabilitation of private buildings principally for the benefit of low and moderate income persons. Therefore, the City and the Council agree that such grants and loans shall be made subject to contracts to be executed between the City and the Council which contracts shall insure that the proceeds of the grants and loans shall be used by the Council consistent with G.S. 160A-456 and with this agreement and that the Council shall give a full accounting for the use of such funds.

21. *Prior Agreements.* This agreement supercedes all prior mitigation plans.

22. *Agreement Is Settlement.* This agreement is a settlement of a dispute. Each party to this agreement denies any legal liability to any other party. The Community does not waive any right it may have to attorney's fees arising out of said dispute. The City and DOT deny any liability for such attorney's fees.

CITY OF DURHAM

s/ By Barry L. Del Castilho
City Manager

ATTEST:
s/ Margaret M. Bruers
City Clerk

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION
s/ By Billy Rose
State Highway Administrator

ATTEST:
s/ Brenda Grady
Secretary to the Board

CREST STREET COMMUNITY COUNCIL, INC.
s/ By Willie Patterson
President

ATTEST:

s/ By Betty J. Johnson
Secretary

(Corporate Seal Affixed)

EXHIBIT E

NORTH CAROLINA
DURHAM COUNTY
NORTH CAROLINA DEPARTMENT OF TRANSPORTATION
AND
CITY OF DURHAM
MUNICIPAL AGREEMENT

STATE PROJECT: 8.1414602

FEDERAL-AID Project: F-58-1(11)

THIS AGREEMENT, made and entered into this the 15th day of December, 1982, between the DEPARTMENT OF TRANSPORTATION, an agency of the State of North Carolina, hereinafter referred to as NCDOT, and the City of Durham, a municipal corporation. hereinafter referred to as the City.

WITNESSETH

WHEREAS, NCDOT and the City propose to enter into a formal agreement for the construction and improvement of certain streets and highways within the City; said improvements to consist of the construction of the East-West Freeway from US 15-501 Bypass to Swift Avenue, as shown on the attached drawing marked as Exhibit A, which is incorporated herein and made a part of this agreement; and,

WHEREAS, said construction is to be accomplished in accordance with the project plans and specifications to be prepared and adopted by NCDOT and approved by the City; said plans to be placed on file with NCDOT's office in

Raleigh, North Carolina with the proposed and existing right of way, control of access, and construction limits being shown on said project plans; and,

WHEREAS, the City Council of the City has approved the construction of said project in accordance with said proposed plans and specifications, and has agreed to participate in certain costs thereof in the manner and to the extent as hereinafter set out; and,

WHEREAS, in order to proceed with said project NCDOT, the City and the Crest Street Community Council, Inc. have jointly developed a Final Mitigation Plan, incorporated herein as Attachment 1, for the Crest Street Community; the boundaries of said community being shown on the attached drawing marked as Exhibit B; and,

WHEREAS, NCDOT is empowered by the General Statutes of North Carolina, Section 133-5 through Section 133-17 as amended to provide last resort housing when comparable housing is not available to allow for the project to proceed to actual construction; said last resort housing being necessary for the implementation of the mitigation plan.

NOW, THEREFORE, in consideration of the premises and the benefits accruing to NCDOT and the City as the result of the construction of Project 8.1414602, Durham County, it is agreed as follows:

1. The City except as set out in paragraph 2 hereinbelow, shall perform, or cause to be performed, the work hereinafter set out when the same shall become necessary by reason of the construction or relocation of streets or sidewalks, or by reason of the widening or improvement thereof; said work to be performed, or provisions made

therefor, in a manner satisfactory to NC DOT prior to beginning construction of Project 8.1414602:

(A) The City, without expense to NCDOT, shall exercise any rights which it may have under any franchise to effect all necessary changes, adjustments, and relocations of telephone, telegraph, and electric power lines, underground cables, gas lines, and other pipelines or conduits, or any privately or publicly owned utilities. Also, without cost to NCDOT or to any housemover that may be under contract with NCDOT, the City shall exercise said rights to cause the utilities to be adjusted or relocated to accommodate the moving of housing for the new Crest Street Community.

(B) The City, without cost or obligation to the Department, except as set out in paragraph 3 hereinbelow, shall lay, change, relay, repair, and otherwise adjust any City owned electric, water, sewer, and gas lines, and any other pipelines or conduits; and shall make all necessary adjustments to house or lot connections or services lying within the right of way or construction limits, whichever is greater, of the project, whether said connections or services are owned by the City or by others. The City shall make every effort to promptly relocate said City owned utilities and to make all necessary adjustments to said house or lot connections or services in order that NCDOT will not be delayed in the construction of the project.

2. NCDOT, where necessitated by the construction of Project 8.1414602, will make vertical adjustments of two (2) feet or less to the existing catch basins, manholes, drop inlets, meter boxes, and valve boxes at no expense to the City.

3. NCDOT will reimburse the City in accordance with the Municipally owned Utility Policy of the Department

contained within the official minutes of the July 2, 1964 meeting of the Board of Transportation, which policy is incorporated herein by reference.

4. In the event NCDOT's contractor performs for the City the relocations and adjustments of any City owned utility lines covered under paragraph 5 of this agreement, upon satisfactory completion of the construction of the relocations and adjustments, the City shall assume normal maintenance operations to said utility lines. Further, unless the City notifies NCDOT, in writing, to the contrary within thirty (30) days or more prior to acceptance of the project by NCDOT from its contractor following completion of construction, the City shall be deemed to have released NCDOT from any and all claims for damages in connection with adjustments made to its utility lines; and the City shall be deemed to have released NCDOT of any future responsibility for cost of maintenance of said lines.

5. It is further agreed that the following provisions shall apply regarding the City owned utilities covered in this agreement:

(A) The City obligates itself to service and maintain its facilities to be retained and installed over and along the highway within NCDOT's right of way limits in accordance with the mandate of the North Carolina General Statutes and such other laws, rules, and regu'ations as have been or may be validly enacted or adopted, now or hereafter.

(B) In the event it becomes necessary, due to any future highway construction or improvement, to adjust or relocate utilities which are being relocated at NCDOT's expense and which are crossing or otherwise occupying highway right of way, the non-betterment cost of same shall be borne by NCDOT. Non-betterment cost

is the cost of adjusting, relocating or replacing a utility line or facility with the same utility line or facility or with one of substantially the same capacity.

(C) If, at any time, NCDOT shall require the removal of or change in the location of the encroaching facilities which are being relocated at the City's expense, the City binds itself, its successors and assigns to promptly remove or alter said facilities, in order to conform to the said requirement, without any cost to NCDOT.

(D) The City agrees to relinquish its right in that portion of right of way vacated by its existing facilities and now absorbed within NCDOT's right of way.

6. NCDOT shall acquire the right of way necessary to provide a right of way of the width and length as called for in the plans and specifications for Project 8.1414602 to be approved by NCDOT and the City and placed on file with NCDOT; said right of way to be provided by NCDOT without any cost whatsoever to the City, except the City shall convey to NCDOT, without cost, any street right of way, easements or property currently owned by the City and located within the right of way for Project 8.1414602.

7. It is agreed between the parties hereto that a supplemental agreement shall be entered into for the purpose of establishing and maintaining traffic operating controls on Project 8.1414602 upon its completion.

8. The City shall prepare and consider adopting, pursuant to the requirements of Article 22 of Chapter 160A of the General Statutes (the Urban Redevelopment Law) a Redevelopment Plan consistent with the FINAL MITIGATION PLAN for the areas whose boundaries are shown on the attached drawing marked as Exhibit C. The pri-

mary objectives of said Redevelopment Plan shall be to provide replacement housing for the Crest Street Community residents and to establish a residential community with long term viability in accordance with the Site Plan For The Crest Street Neighborhood Relocation as shown on the attached drawing marked as Exhibit D which is incorporated herein and made a part of this agreement. Prior to final action thereon by the City said Redevelopment Plan shall be submitted to NCDOT's Manager of Project Management Branch, hereinafter referred to as NCDOT's Manager, for review and comment by NCDOT. Such review and comment shall be completed within thirty (30) days from the receipt by NCDOT of said Redevelopment Plan, unless by the mutual agreement of both parties, the time therefor be extended. If the Redevelopment Plan, as finally acted upon by the City, is not acceptable to NCDOT, or if no Redevelopment Plan is approved, NCDOT shall have the right to rescind within thirty (30) days of April 5, 1983 this agreement and Final Mitigation Plan.

9. Subsequent to the approval of the Redevelopment Plan by the City, the City shall prepare, at no cost to NCDOT, preliminary plans and specifications for the streets, sidewalks and utilities to be constructed by the City in accordance with the Site Plan For The Crest Street Neighborhood Relocation (Exhibit D). The City shall submit said preliminary plans and specifications, either as a single project or as several projects, to NCDOT's Manager for review and approval. Such review and approval shall be completed within thirty (30) days from the receipt by NCDOT of said plans and specifications, unless by the mutual agreement of both parties, the time therefor be extended.

10. NCDOT shall reimburse the City to the extent of sixty-two and four-tenths (62.4%) percent of the approved costs allowable for FHWA participation which are incurred by the City for all of the projects designated in paragraph 9 above. Said reimbursement shall be subject to the policies and procedures contained in Title 19A, Subchapter 5B, Section .0300 of the North Carolina Administrative Code which is incorporated in this agreement by reference as fully as if herein set out. Said reimbursements shall be made as follows:

(A) The City may bill the Department on a monthly basis for said reimbursable project costs by submitting an invoice, in quadruplicate, accompanied by a breakdown of items of construction. Proper supporting documentation shall accompany each invoice as may be required by NCDOT. Invoices for the items of construction shall be submitted to NCDOT's Manager and shall become due 30 days from receipt by him.

(B) The City shall submit a final itemized invoice listing all reimbursable project costs to NCDOT's Manager upon completion of construction of the project or projects. Said invoice shall be accompanied by a breakdown of all construction costs.

(C) Reimbursement for construction contract work shall be made on the basis of contract unit prices in the construction contract and any approved supplemental agreements.

(D) Reimbursement to the City for all invoices submitted shall be made upon approval of each invoice by NCDOT.

(E) The City agrees that it shall bear all costs of any item for which it is unable to substantiate actual costs or any costs which have been deemed unallowable.

11. The City's contract administration procedures shall be submitted to NCDOT's Manager for NCDOT'S review and approval prior to advertising for construction bids for any project designated in paragraph 9 above.

12. Prior to advertising any project designated in paragraph 9 above for construction bids, the City shall submit for approval by NCDOT the final plans, the total contract proposal and an estimate of the project costs to NCDOT's Manager. Bids received, along with proper documentation of City approval, shall be submitted to NCDOT's Manager for review and approval by NCDOT and the Federal Highway Administration prior to the contract being awarded by the City. Further, upon award of the contract, the City shall furnish to NCDOT's Manager seven (7) copies of the executed contract and seven (7) sets of plans. The City shall follow NCDOT regulations and Federal Highway Administration regulations pertaining to bid procedures in the award of the contract consistent with Article 8 of Chapter 143 of the General Statutes. Said Federal Highway Administration regulations are contained in Federal-Aid Highway Program Manual, Volume 6, Chapter 4, Section 1, Subsection 1 and Volume 6, Chapter 4, Section 1, Subsection 6; said policy being incorporated in this agreemnt by reference as fully as if herein set out.

13. The City shall construct, or cause to be constructed, any project designated in paragraph 9 above in accordance with the plans and specifications of said project or projects as filed with and approved by NCDOT.

During the construction of said project or projects designated in paragraph 9 above, the procedures set out hereinbelow shall be followed:

(A) The City shall perform or cause to be performed the necessary construction engineering, sampling and testing, and supervision required during construction of said project or projects.

(B) During construction of said project or projects, if any changes in the project plans are necessary, such changes must be approved by NCDOT's Manager or his designee prior to the work being performed.

(C) NCDOT's Manager or his designee and representatives of the Federal Highway Administration shall have the right to inspect, sample or test, and approve or reject, any portion of said project or projects during construction.

(D) Prior to the final approval and payment by NCDOT, said Manager, or his designee, and a representative of the Federal Highway Administration shall make a final inspection of the completed work.

(E) The City shall be responsible for insuring that the contractor complies with all of the terms of the contract and any instructions issued by NCDOT's Division Engineer for the Fifth Division as a result of any review or inspection made by said Division Engineer.

(F) Upon completion of said project or projects, the City shall furnish or cause to be furnished NCDOT's Fifth Division Engineer with a certification that contract administration has been accomplished in accordance with the City's procedures that have been approved by NCDOT.

The City shall also furnish certification that materials used in the construction meet the requirements as set forth in the contract.

(G) Upon completion of said project or projects, the City shall furnish NCDOT's Fifth Division Engineer with one complete set of As-Built Plans.

(H) The City shall be responsible for the establishment and maintenance of an accounting system for the project or projects and shall keep a work order system in such a manner as to show the nature of each cost making up the total costs and the source or sources of such costs. The accounting system and procedures which are established for the project or projects must be in accordance with generally acceptable accounting principles, and must be reviewed and approved by NCDOT's Fiscal Officer prior to beginning any work on the project.

(I) The City shall maintain records to document quantities for which the contractor is paid during any monthly estimate period.

(J) The City shall maintain all records that establish final documentation of quantities incorporated into said project or projects in accordance with established NCDOT procedures.

(K) All project records developed by the City that are not submitted to NCDOT shall be retained by the City for a period of three (3) years after the date of final payment.

(L) During construction of said project or projects, the City shall provide and maintain adequate barricades, signs, signal lights, flagmen, and other warning

devices necessary for the protection of traffic in conformance with the 1978 edition of the *Manual on Uniform Traffic Control Devices for Streets and Highways,* or any subsequent revision of the same, published by the Federal Highway Administration and effective at the time of the award of the contract or contracts.

(M) Failure on the part of the City to comply with any of the provisions of this paragraph 13 shall be grounds for NCDOT to withdraw participation on any or all of the items of work involved.

14. During the performance of the work on any project designated in this contract, the City and NCDOT and all its contractors shall comply with "Title VI of the Civil Rights Act of 1964" as set forth in Attachment 2, and the Minority Business Enterprise Requirements set forth in Attachment 3.

15. The City shall administer the construction contracts of all projects designated in paragraph 9 above at no cost to NCDOT.

16. The City and its contractor or contractors for any project designated in paragraph 9 above shall maintain all books, documents, papers, accounting records, and such other evidence as may be appropriate to substantiate costs incurred under this agreement. Further, the City shall make such materials available at its office and shall require its contractor or contractors to make such materials available at its office or offices at all reasonable times during the contract period, and for three (3) years from the date of final payment by NCDOT under this agreement, for inspection and audit by NCDOT, the

Federal Highway Administration, or any authorized representatives of the Federal Government.

17. Upon completion of the street system in the relocated Crest Street Neighborhood, as shown on Exhibit D and referred to in paragraph 9 above, the City shall be responsible for the establishment and maintenance of traffic operating controls on said street system. Said controls shall be in accordance with the 1978 edition of the *Manual on Uniform Traffic Control Devices for Streets and Highways,* or any subsequent revision of the same, published by the Federal Highway Administration.

18. The City shall be responsible for the proper maintenance of the completed improvements referred to in paragraph 9 above and for the costs thereof.

19. The City agrees to bear the costs of the neighborhood park, the community center, the landscaping, and the site plan required to be provided under paragraph 4 of the FINAL MITIGATION PLAN; the costs of the grants, loans, and assistance in filing applications required to be provided under paragraph 11 of the FINAL MITIGATION PLAN; the costs of providing deferred second mortgages required to be provided under paragraph 12 of the FINAL MITIGATION PLAN and the costs of rehabilitation assistance (in excess of the amount provided by relocation assistance benefits) required to be provided under paragraph 12 and paragraph 17 of the FINAL MITIGATION PLAN. NCDOT agrees to bear the costs of the noise abatement wall and its landscaping required to be provided under paragraph 14 of the FINAL MITIGATION PLAN.

20. The City agrees to bear the costs of relocation assistance to all displacees living in the East Fulton Street Redevelopment Area and thirty-seven and six-tenths percent (37.6%) of the costs of relocation assistance to all displacees living in the West Fulton Street Redevelopment Area, which areas are shown on Exhibit E, consistent with and subject to the limitations of N.C.G.S. 133-8, 9, and 10. NCDOT agrees to bear the costs of relocation assistance, including last resort housing under N.C.G.S. 133-10.1, for all displacees living within the right of way of the East-West Expressway and its interchange with Fulton Street in the Crest Street Urban Renewal Area. NCDOT further agrees to bear the costs of relocation assistance, including last resort housing benefits under N.C.G.S. 133-10.1, for all displacees living within the East and West Fulton Street Redevelopment Areas, over and above the costs agreed to be borne by the City as hereinbefore set out. NCDOT agrees to administer the relocation assistance program prescribed herein, including last resort housing benefits pursuant to N.C.G.S. 133-10.1, and the City agrees to reimburse NCDOT for all direct costs of its administration of relocation assistance to displacees living in the East Fulton Street Redevelopment Area and thirty-seven and six-tenths percent (37.6%) of the direct costs of its administration of relocation assistance to displacees living in the West Fulton Street Redevelopment Area.

21. NCDOT shall acquire through negotiation or condemnation the property located within the right of way for the East-West Freeway Project, except to the extent such right of way may be required pursuant to paragraph 22 of this agreement. NCDOT, acting on behalf of the City,

shall acquire through negotiation the property located within the Crest Street Urban Renewal Area which lies outside of said right of way; subject, however, to be reimbursed by the City as follows:

(A) The City shall reimburse NCDOT to the extent of one hundred (100) percent for all expenditures which the Department may make in acquiring or on account of the property located within the Crest Street Community boundaries east of Fulton Street and outside the right of way designated for Project 8.1414602. Said property is designated at the East Fulton Street Area and is shown on the attached drawing marked Exhibit E, which is incorporated herein and made a part of this agreement. The cost of acquiring said property shall include, but not be limited to, the cost of the property, utilities, the cost of relocation assistance and payments (excluding, however, the cost of last resort housing benefits provided under N.C.G.S. 133-10.1), and all administrative costs such as appraisal fees, negotiation costs, relocation assistance and record keeping. For those parcels of property which are partially inside the right of way and partially outside the right of way in the East Fulton Street Area, the cost to the City for each parcel of said property shall be computed based on the total cost, as defined hereinabove within this paragraph, of said parcel multiplied by the ratio of the land area of said parcel outside the right of way to the total land area of said parcel.

(B) The City shall reimburse NCDOT to the extent of thirty-seven and six-tenths percent (37.6%) for all expenditures which NCDOT may make in acquiring or on account of the property located within the Redevelopment Area boundaries west of Fulton Street and outside

the right of way designated for Project 8.1414602. Said property is designated as the West Fulton Street Area on Exhibit E. The cost of acquiring said property shall include, but not be limited to the cost of the property, the cost for removal therefrom of all obstructions of any kind or character necessary for the implementation of the mitigation plan, the cost of relocation assistance and payments (excluding, however, the cost of last resort housing benefits provided under N.C.G.S. 133-10.1), and all administration costs such as appraisal fees, negotiation costs, relocation assistance and record keeping. For those parcels of property which are partially inside the right of way and partially outside the right of way in the West Fulton Street Area, the cost to the City for each parcel of said property shall be computed based on the total cost, as defined hereinabove within this paragraph, of said parcel multiplied by the ratio of the land area of said parcel outside the right of way to the total land area of said parcel and then multiplied by thirty-seven and six-tenths percent (37.6%).

(C) NCDOT may bill the City on a monthly basis for reimbursable costs by submitting an invoice in quadruplicate, accompanied by a breakdown of items and supporting documentation as may be required by the City. Said invoices shall be submitted to the City's Finance Officer and shall become due 30 days from receipt by him.

(D) A final itemized invoice listing all reimbursable costs shall be submitted to the City upon completion of all work performed under this paragraph by NCDOT within the Redevelopment Area. Said invoice shall be accompanied by a breakdown of such items and documentation as may be required by the City.

(E) Reimbursement to NCDOT for all invoices submitted shall be made upon approval of each invoice by the City.

(F) NCDOT agrees that it shall bear all costs of any item for which it is unable to substantiate actual costs or any costs which have been deemed unallowable.

(G) NCDOT shall maintain all books, documents, papers, accounting records and such other evidence as may be appropriate to substantiate costs incurred under this agreement. Further, NCDOT shall make such materials available at its office at all reasonable times during the acquisition period and for three (3) years from the date of payment of the final voucher by the City under this agreement, for inspection and audit by the City.

(H) It is agreed that NCDOT and the City shall, without cost to the other, allow any property which it currently owns outside the right of way for Project 8.1414602 and within the Crest Street Community boundaries to be conveyed or utlized for the implementation of the mitigation plan hereinabove incorporated as Attachment 1.

22. If NCDOT cannot acquire through negotiation any parcel of land, any portion of said parcel being located outside the right of way for Project 8.1414602 but within the redevelopment area, NCDOT shall turn over the acquisition of the entire parcel to the City for condemnation proceedings in accordance with its authority under Chapter 40A of the General Statutes and the Urban Redevelopment Law. Upon final settlement of such claim, the City shall bill NCDOT for its reimbursable costs, by submitting an invoice in quadruplicate, accompanied by a breakdown

of items and supporting documentation as may be required by the Department.

23. Upon the sale by the City or NCDOT of any land, improvements or other property acquired by either party located within the Crest Street Urban Renewal Area (Exhibit C), whether such property be from the right of way for the East-West Freeway project, the West Fulton Street Redevelopment Area or the East Fulton Street Area, the parties shall be entitled to receive the sales price, as a credit or reimbursement, as follows: thirty-seven and six-tenths percent (37.6%) thereof to the City, and sixty-two and four-tenths percent (62.4%) thereof to NCDOT.

24. The City shall convey or transfer title to the lots in the West Fulton Street Redevelopment Area which are to be sold to owner-occupant relocatees and tenant-home owner conversion relocatees under paragraph 9 and paragraph 12 of the FINAL MITIGATION PLAN to NCDOT without consideration other than the mutual benefits of this agreement.

25. NCDOT shall acquire all property and relocate all displacees in accordance with the requirements of the Uniform Relocation Assistance and Land Acquisition Policies Act of 1970, as amended, 42 USC 4601 *et seq.*

26. It is agreed that the provisions of the FINAL MITIGATION PLAN for the Crest Street Community, incorporated hereinabove as Attachment 1, shall be fully binding upon NCDOT and the City.

27. As part of the FINAL MITIGATION PLAN for the Crest Street Community it is necessary that certain

existing dwelling units be moved and rehabilitated and other dwelling units, building and appurtenances be demolished or removed. To accomplish this objective NCDOT and the City agree to the following provisions:

(A) NCDOT and the City shall identify those dwelling units which are suitable for moving and rehabilitating and those dwelling units, buildings and appurtenances which should be demolished or removed.

(B) NCDOT shall prepare all necessary proposals and contracts for the moving, demolition or removal of all dwelling units, buildings, appurtenances or obstructions of any kind or character necessary for the implementation of the mitigation plan.

(C) The demolition, removal or relocation of existing dwelling units, buildings and appurtenances shall be done in accordance with Sections 210, 215 or 220, whichever is applicable, of the N. C. Department of Transportation's Standard Specifications for Roads and Structures which are incorporated herein by reference.

(D) NCDOT shall follow its standard bid procedures and contract administration procedures on all moving and demolition contracts.

(E) NCDOT shall be responsible for insuring that all contractors comply with all the terms of all relocation or demolition contracts.

(F) Upon completion of each demolition or relocation contract, NCDOT shall submit to the City an invoice in quadruplicate stating the City's share of the cost of said relocation or demolition, accompanied by supporting documentation as may be required by the City. Said

invoice shall be submitted to the City's Finance Officer and shall become due 30 days from receipt by him.

(G) Reimbursement to NCDOT for all invoices submitted shall be made upon approval by the City.

(H) The City's share of said relocation and demolition costs shall be one hundred (100) percent for those dwelling units, buildings and appurtenances which are located within the Crest Street Community boundaries east of Fulton Street and wholly outside the right of way designated for Project 8.1414602 and thirty-seven and six-tenths (37.6%) percent for those dwelling units, buildings and appurtenances which are located within the Redevelopment Area west of Fulton Street and wholly outside the right of way designated for Project 8.1414602.

(I) For those dwelling units that are to be rehabilitated pursuant to the City's Community Development Rehabilitation Program (Attachment 1 of FINAL MITIGATION PLAN), and after said units have been relocated in accordance with items A through H hereinabove, the City shall prepare all bid specifications and contracts for said rehabilitation and shall be responsible for the administration of said contracts.

(J) The rehabilitation of said dwelling units shall be done in a timely manner and shall be done in accordance with Attachment 2 of the FINAL MITIGATION PLAN.

(K) The City shall follow its standard bid procedures and contract administration procedures for all rehabilitation contracts.

(L) The City shall be responsible for insuring that all contractors comply with all the terms of all rehabilitation contracts.

(M) NCDOT's share of said rehabilitation cost for those dwelling units which are to be occupied by displacees presently located within the right of way of Project 8.1414602 shall be in accordance with General Statute 133-5 through 133-17 as amended and the Department's rules and regulations.

28. The FINAL MITIGATION PLAN for the Crest Street Community contains provisions for existing homeowners to remain homeowners and for existing tenants, who are eligible, to convert to home ownership. The respective responsibilities of NCDOT and the City are designated in the mitigation plan. It is agreed that NCDOT shall administer all aspects of said provisions for homeownership as part of the acquisition process described in paragraphs 21 through 23 hereinabove.

29. NCDOT will complete Project 8.1414602 in accordance with the plans and specifications to be adopted therefor, or as altered or amended by NCDOT. NCDOT shall have the right to abandon Project 8.1414602 at any time before the City has been called upon to perform any part of its agreement.

30. All exhibits and attachments referred to in this agreement are incorporated herein by reference.

31. The City and NCDOT agree that the agreement for City participation in the costs of right of way for the East-West Expressway embodied in the resolution of the City's City Council adopted June 18, 1962 and concurred in by the State Highway Commission on June 28, 1962 is

modified as and to the extent provided in this agreement and not modified with respect to other segments of said Expressway.

IN WITNESS WHEREOF, this agreement has been executed, in duplicate, the day and year heretofore set out, on the part of NCDOT and the City by authority duly given, as evidenced by the attached certified copy of resolution, ordinance or charter provision, as the case may be.

L.S.

ATTEST:	CITY OF DURHAM
s/ Margaret M. Bowers Clerk	s/ By: Barry L. Del Castilho City Manager

L. S.

ATTEST:	DEPARTMENT OF TRANSPORTATION
s/ Brenda Grady SECRETARY TO THE BOARD	s/ By: Billy Rose STATE HIGHWAY ADMINISTRATOR APPROVED RUFUS L. EDMISTEN ATTORNEY GENERAL s/ By: James B. Richmond ASSISTANT ATTORNEY GENERAL

SUBJECT: EAST/WEST EXPRESSWAY MUNICIPAL AGREEMENT AND FINAL CREST STREET MITIGATION PLAN

Motion by Council Member Pledger seconded by Council Member Kerckhoff to authorize the City Manager to execute the Municipal Agreement between the City and the North Carolina Department of Transportation for the construction of the East-West Expressway between Erwin

Road and U. S. Highway 15-501 and the relocation of the Crest Street Community was approved by the following vote: Ayes: Mayor Markham and Council Members Griffin, Campbell, Davis, Jenkins, Hunt, Kerckhoff, Pledger, West, Sloan and Vick. Noes: None. Excused Absence: Council Member Poole. Absent: Council Member Smith.

Motion by Council Member Pledger seconded by Council Member Kerckhoff to authorize the City Manager to execute the Final Mitigation Plan (which is incorporated into the Municipal Agreement) between the City, the North Carolina Department of Transportation and the Crest Street Community Council to relocate the Crest Street Community as a community was approved by the following vote: Ayes: Mayor Markham and Council Members Griffin, Campbell, Davis, Jenkins, Hunt, Kerckhoff, Pledger, West, Sloan and Vick. Noes: None. Excused Absence: Council Member Poole. Absent: Council Member Smith.

NORTH CAROLINA
DURHAM COUNTY

I, Margaret M. Bowers, duly appointed City Clerk of the City of Durham, do hereby certify that the above is a true and accurate copy of the action taken by the Durham City Council at the November 15, 1982 Durham City Council Meeting, and is on file in the City Clerk's Office at City Hall.

WITNESS my hand and the corporate seal of the City of Durham, this 13th day of December, 1982.

s/ Margaret M. Bowers
City Clerk

(Corporate Seal affixed)

(Maps and drawings attached as exhibits omitted in printing)

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA
DURHAM DIVISION

NO. C-352-D-72

ECOS, INC.; DREW DIEHL; ASSOCIATED STUDENTS OF DUKE UNIVERSITY; STEVE SCHEWEL and HENRY BECK, Members of Associated Students of Duke University; and JOHN ROBERTSON,

Plaintiffs

CREST STREET COMMUNITY COUNCIL, INC. and WILLIE PATTERSON,

Applicants for Intervention

v.

CLAUDE S. BRINEGAR, Secretary of United States Department of Transportation; T. J. MORAWSKI, Division Engineer, Federal Highway Administration; McLAUCHLIN D. FAIRCLOTH, Commissioner, North Carolina State Highway Commission; W. F. CADDELL, JR., Planning and Research Engineer, North Carolina State Highway Commission; and NELLO TEER COMPANY, A Corporation,

Defendants.

CONSENT JUDGMENT

(Filed 14 December 1982)

1. Plaintiffs brought this action on December 18, 1971, seeking an injunction prohibiting further construction of the East-West Expressway in Durham, North Carolina, on grounds of alleged violations of the requirements for a public hearing under 23 U.S.C. § 128, as amended, of alleged failure to comply with Section 4(f) of the Depart-

ment of Transportation Act of 1966, 49 U.S.C. § 1653(f), and Section 138 of the Federal-Aid to Highway Act of 1968, 23 U.S.C. § 138 with respect to the use of lands protected thereunder, and of alleged failure to comply with Section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(a)(C).

2. The Durham East-West Expressway, if completed as proposed, will be a multi-lane controlled access highway which will extend from an interchange with existing Interstate 85 west of Durham easterly and southerly through the City to an interchange with the North-South Expressway and then northerly by way of the U.S.-70 Connector to an interchange with existing U. S. Highway 70 east of Durham, a total distance of 9.2 miles.

3. At the time of the institution of this action, a section of the expressway 1.7 miles in length lying between Chapel Hill Street and Alston Avenue had been completed and was open to traffic; another section 1.9 miles in length, lying between Alston Avenue and the North-South Expressway was under construction and almost complete; and another section 0.8 miles in length, lying between Chapel Hill Street and Erwin Road, was under construction by the defendant Nello L. Teer Company pursuant to a contract executed October 10, 1972.

4. On February 20, 1973, following a hearing on plaintiffs' motion for a preliminary injunction, the court denied relief as to the 0.8 mile section under construction but restrained and enjoined the defendants from taking any steps leading towards construction of the segment lying between Erwin Road and the interchange at I-85 until compliance in full with the statutes alleged to have been violated and implementing regulations.

5. On November 8, 1973, the plaintiffs and the defendants, by consent judgment, settled their controversy as to the 0.8 mile segment under construction.

6. The North Carolina Department of Transportation, with federal assistance, now intends to construct a section of the expressway lying between Erwin Road and U. S. Highway 15-501.

7. The State defendants have filed a motion seeking dissolution of the injunction and dismissal of the action. The attorneys for the plaintiffs have filed responses to the State defendants' motion for dissolution of the injunction. Crest Street Community Council, Inc. and Willie Patterson, applicants for intervention, have filed a motion for intervention as plaintiffs in the action either as of right pursuant to Rule 24(a)(2) or by permission pursuant to Rule 24(b)(2).

8. The State defendants and the applicants for intervention have resolved the things and matters in controversy between them by agreement adopted by the North Carolina Board of Transportation on November 19, 1982. The plaintiffs and the applicants for intervention do not or no longer oppose the State defendants' motion to dissolve the injunction and do not wish to prosecute this action any further except that the applicants for intervention explicitly reserve the right to pursue all claims in their application for intervention in the event said agreement is not fully implemented, and in addition, reserve their claim for attorney fees against the State defendants and the North Carolina Department of Transportation and the plaintiffs reserve their right to pursue all claims relating

to the section of the expressway proposed to be constructed between U.S. Highway 15-501 and Interstate 85.

NOW, THEREFORE, without further proceedings, and upon consent of the parties, it is hereby ORDERED, ADJUDGED and DECREED:

1. That the injunction presently in force in this action is dissolved and is of no further force or effect;

2. All claims in this action are dismissed, and this dismissal is with prejudice for all claims except those explicitly reserved in Paragraph Eight above by applicants for intervention and plaintiffs.

3. That the plaintiffs and the defendants shall bear their own costs, including their own attorney fees.

This the 14th day of December, 1982.

s/ EUGENE A. GORDON
UNITED STATES DISTRICT COURT JUDGE

WE CONSENT:

SMITH, PATTERSON, FOLLIN, CURTIS, JAMES & HARKAVY

s/ By MICHAEL K. CURTIS
Attorney for Plaintiffs

s/ By WILBUR P. GULLEY
Attorney for Plaintiff Steve Schewel

NORTH CENTRAL LEGAL ASSISTANCE PROGRAM

s/ By MICHAEL D. CALHOUN
Attorney for Applicants for Intervention

RUFUS L. EDMISTEN
Attorney General

s/ By JAMES B. RICHMOND
Special Deputy Attorney General
Attorney for State Defendants

s/ By BENJAMIN H. WHITE, JR.
Assistant United States Attorney
Attorney for the Federal Defendants

s/ By R. ROY MITCHELL, JR.
Attorney for the Defendant Nello Teer Company

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

File No. C-83-1239-D

(Parties omitted in printing)

DEFENDANTS' MOTION TO DISMISS THE ACTION

(Filed 8 August 1984)

The defendants North Carolina Department of Transportation, North Carolina Board of Transportation and William R. Roberson, as Secretary of the North Carolina Department of Transportation and Chairman of the North Carolina Board of Transportation, by and through their attorney, respectfully move the Court pursuant to Rules 12(b) and 12(c) of the Rules of Civil Procedure for an order dismissing this action on the following grounds:

(1) The Court lacks jurisdiction over the subject matter of the action and over the person of the defendants.

(2) In essence this is an action against the State of North Carolina, which has not consented to suit nor otherwise waived its sovereign immunity or its immunity from suit under the Eleventh Amendment to the Constitution of the United States.

(3) The Complaint fails to state a claim upon which relief can be granted.

(4) The plaintiffs lack standing to bring and maintain this action.

(5) The plaintiffs have failed to pursue and exhaust their administrative remedies.

The grounds for this motion are more fully set forth in the defendants' accompanying brief.

This the 8th day of August, 1984.

RUFUS L. EDMISTEN
Attorney General

s/ JAMES B. RICHMOND
Special Deputy Attorney General
N. C. Department of Justice
Raleigh, North Carolina
Attorney for Defendants

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

C-83-1239-D

(Parties omitted in printing)

JUDGMENT

(Filed 29 November 1984)

This matter came before the Court for ruling on defendants' Motion to Dismiss for failure to state a claim and for judgment on the pleadings and on plaintiffs' Motion for Summary Judgment. Because matters outside the pleadings were presented and not excluded, the Court treated defendants' motion as one for summary judgment in accordance with Fed.R.Civ.P. 12(b)(6) & (c). In a Memorandum Opinion and Order, filed contemporaneously herewith, the Court granted defendants' motion and denied plaintiffs' motion.

IT IS, THEREFORE, ORDERED and ADJUDGED that this action be, and the same hereby is, DISMISSED.

s/ HIRAM H. WARD
United States District Judge

November 29, 1984.

Supreme Court, U.S.
FILED
APR 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-767

In The
Supreme Court of the United States
October Term, 1986

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, ET AL.,

Petitioners,

v.

CREST STREET COMMUNITY COUNCIL, INC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

BRIEF FOR PETITIONERS

LACY H. THORNBURG
Attorney General for the State of North Carolina
JAMES B. RICHMOND*, Special Deputy Attorney General for the State of North Carolina
Post Office Box 25201
Raleigh, North Carolina 27611
Telephone: (919) 733-4185
Counsel for Petitioners

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTIONS PRESENTED*

I. Are attorney's fees recoverable under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, by prevailing parties for representation in a federal administrative proceeding under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which fees are not for time expended on a judicial proceeding in court?

II. Does the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, give prevailing parties in an administrative proceeding under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, a right to bring an independent civil action to recover attorney fees?

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* Rule 28.1 is not applicable in this case.

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REPORTS OF OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 769 F.2d 1025 (4th Cir. 1985). A copy thereof is printed in the Appendix to the Petition for Writ of Certiorari at page App. 1. The opinion of the United States District Court is reported at 598 F.Supp. 258 (M.D. N.C. 1984). A copy thereof is printed in the Appendix to the Petition for Certiorari, at page App. 22.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on August 15, 1985. The Petition for Writ of Certiorari was docketed on November 13, 1985. Certiorari was granted on January 13, 1986. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254.

STATUTE INVOLVED

The statute involved is The Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, which provides in relevant part:

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

The Respondents are civic organizations which represent the interests of the Crest Street community, a stable, cohesive black neighborhood in western Durham, North Carolina. Respondents commenced this civil action on November 30, 1983, in the United States District Court for the Middle District of North Carolina, Durham Division, seeking to recover attorneys' fees and other expenses, under The Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, for representation (i) in an "administrative proceeding" under 49 C.F.R. Part 21 to enforce Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1, and (ii) in a motion to intervene in *ECOS et al. v. Brinegar, et al.*, No. C-352-D-72 (M.D.N.C.) and leave to file a complaint therein to enforce Title VI and other statutes. (J.A. 3, 73, and 100). The representation arose out of controversy over the planned further construction of the East-West Freeway, a Federal-aid highway.[1]

On September 7, 1978, Respondents filed an "administrative complaint" with the Secretary of the United States Department of Transportation (USDOT), which alleged that the North Carolina Department of Transportation (NCDOT) in its planning for the construction of the freeway through the Crest Street community was in violation of Title VI and 49 C.F.R. § 21.7(d), and other statutes governing eligibility for federal-aid to State highway construction. (J.A. 73). At the time the "administrative complaint" was filed, NCDOT and the Federal Highway Administration (FHWA) were in the final stages of preparing a Revised Draft Environmental Impact Statement (RDEIS) for the freeway.[2] As proposed in the RDEIS, an interchange of the freeway would be placed in the midst of the Crest Street community which would take its church and park and displace a great many of its members. (RDEIS 73-75, 90, 97, and Figure 9). Shortly after the Complaint was filed, FHWA noted that preparation of an acceptable Final Environmental Impact Statement without resolution of the Crest Street issues was highly unlikely and urged the exploration of alternatives to resolve it. (FIAR 63).

The Secretary treated the "administrative complaint" as one made under 49 C.F.R. § 21.11(b) and consequently

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[1]The Federal-Aid Highway Act, as amended, 23 U.S.C. § 101 *et seq.*, provides for a national system of highways, with a portion of the cost to be borne by the federal government. Pursuant to this Act and its implementing regulations, 23 C.F.R., State highway departments, under federal oversight, plan and select the roads to be constructed. Since such plans and selections must be specifically approved by the federal Secretary of Transportation before any agreement for federal reimbursement may be entered into, in the final analysis, the decision as to the location and design of the highway is federal. *Fayetteville Area Chamber of Commerce v. Volpe*, 463 F.2d 402 (4th Cir. 1972).

[2]The federal responsibility under Section 102(1)(C) of the National Environmental Policy Act of 1971, 42 U.S.C. § 4332(1)(C), and implementing regulations, to prepare draft and final environmental impact statements is delegated to the State highway department, is accomplished under federal oversight, and the resulting statements are adopted by the federal Secretary of Transportation. 23 C.F.R. Part 771; *Fayetteville Area Chamber of Commerce v. Volpe*, 515 F.2d 1021 (4th Cir. 1975). In the District Court in the present action, Petitioners filed copies of the Revised Draft Environmental Impact Statement for the freeway, together with copies of other documents received by Petitioners from the United States Department of Transportation in response to a Freedom of Information Act request. These documents appear in Volume III of the Record on Appeal in the Court of Appeals and are referred to herein as RDEIS, FEIS, and FIAR.

conducted an investigation under 49 C.F.R. § 21.11(c). (FIAR 115). NCDOT and FHWA continued to explore alternatives which might resolve the Crest Street issues but without success. By letter dated February 20, 1980, the Director of Civil Rights for USDOT informed the Secretary of NCDOT, "we find reasonable cause to believe that the construction of the Expressway (sic) along the alignment proposed in the Draft EIS would constitute a prima facie violation of Title VI, and, in particular § 21.5 (b) (3) of our departmental Title VI regulation . . .". (J.A. 97). Thereafter representatives of the Petitioners, the Respondents, the City of Durham and other interested parties held discussions to try to resolve the Crest Street issues. (FEIS 19, 20). Respondents' initial objective for filing the "administrative complaint" was to halt permanently the construction of the freeway or to divert it to another location outside of the Crest Street community so that the neighborhood could receive community development funds. (FIAR 71-83). On September 15, 1981, Respondents indicated that they were agreeable to change their initial objective and to discuss a mitigation plan which would need to include a number of items including payment of attorney fees for representation in the civil rights complaint. (FIAR 203-205). The issue of the payment of attorney fees was put aside, and representatives of the Petitioners, Respondents and the City of Durham proceeded to negotiate an acceptable mitigation plan. (See FEIS 18-21). In March of 1982 the parties reached a "preliminary agreement" on an acceptable mitigation plan. (See FIAR 206-215). The "preliminary agreement" was incorporated into the Final Environmental Impact Statement which was approved by FHWA on July 23, 1982.

(FEIS 99 *et seq.*). The mitigation plan in the FEIS was noted to be a "working document with the clear understanding by all parties that the final mitigation plan will contain the details of the implementation." (FEIS 108). This mitigation plan would compress the expressway and its interchange in the Crest Street community and would relocate the entire community as a whole to an adjacent site by the use of a combination of State, Federal and local programs.

Since February 20, 1973, further construction of the East-West Freeway had been enjoined in the *ECOS* case pending compliance with public hearing requirements of 23 U.S.C. § 128 and preparation and filing of a Final Environmental Impact/Section 4f Statement in compliance with 42 U.S.C. § 4332(1) (C) and 49 U.S.C. § 1653(f).[3] Obviously, and the disputants were clearly aware, implementation of the mitigation plan could not be carried out unless the injunction were dissolved. (See the last paragraph of the "Preamble" and paragraphs 1 and 2 of the Final Mitigation Plan.) (J.A. 109). In August of 1982, NCDOT filed a motion together with a copy of the FEIS and other supporting documents in the *ECOS* case seeking dissolution of the injunction. In October, 1982, Plaintiff Crest Street Community Council, Inc., and a private citizen of the Crest Street community moved to intervene in the *ECOS* action as parties-plaintiff and to file a com-

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[3]This decision is reported unofficially in 5 E.R.C. 1019, 3 E.L.R. 20303, affirmed *per curiam*, No. 73-1508 (4th Cir. 1973), 4 E.L.R. 20010. Federal jurisdiction over the State defendants in the *ECOS, Inc.*, case was "a form of pendant jurisdiction, but based upon necessity rather than convenience and limited to preventing emasculation of remedy clearly available against the federal (defendants)". *Arlington Coalition on Transportation v. Volpe*, 458 F.2d 1323 (4th Cir. 1972).

plaint which would allege violation of Title VI and other federal-aid compliance laws and which would seek as relief (i) an injunction prohibiting extension of the freeway through the Crest Street community; (ii) a declaration that the acts and practices of the defendants violate Title VI and other laws; and (iii) an order that the defendants pay the plaintiffs' attorney fees and costs. (J.A. 100). On December 14, 1982, a day before the formal and ceremonial execution of the Final Mitigation Plan, but subsequent to the approval of its language by the parties and authorization of its execution, Crest Community Council, Inc., as an "applicant for intervention", joined in a Consent Judgment which dissolved the injunction in the *ECOS* case but explicitly reserved the right to pursue all claims in the event the mitigation plan not be fully implemented, and in addition reserved the claim for attorney fees against the State defendants. (J.A. 153). The application for intervention was not allowed and the applicants' proposed complaint was not allowed to be filed. In paragraph 22 of the Final Mitigation Plan, the parties make it clear that any right to recover attorney fees was not waived and any liability for the payment of such fees was denied.[4] (J.A. 130).

No action to effect compliance with Title VI by any means authorized by law was ever taken under the procedure provided by 49 C.F.R. § 21.13 *et seq.* Compliance

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[4]It would be ironic if the Respondents, by carrying out their agreement in the Final Mitigation Plan to support dissolution of the *ECOS* injunction so that the Final Mitigation Plan could be implemented, were thereby "bootstrapped" into recovery of attorney fees, the stumbling block issue which the parties had put aside at the onset of their negotiations and reserved for determination on a later day.

with Title VI was secured by informal and voluntary means.

On cross motions for summary judgment, the district court denied Respondents' motion, allowed the Petitioners' motion and dismissed the action. The United States Court of Appeals reversed the judgment of the District Court and remanded for determination of a reasonable fee. The Court of Appeals denied the Petitioners' motion for a stay of mandate pending Application for a Writ of Certiorari. The Petition for Writ of Certiorari was docketed November 13, 1985 and certiorari was granted January 13, 1986. On motion of Petitioners, the time allowed for filing their brief on the merits and the joint appendix was extended to March 27, 1986, and then was further extended to April 4, 1986.

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SUMMARY OF ARGUMENT

The language of the statute itself, and its legislative history, when viewed in the light of the enforcement scheme provided by Title VI and its legislative history, establish that Congress did not intend the Civil Rights Attorney's Fees Award Act of 1966, 42 U.S.C. § 1988, to authorize recovery of attorney fees for time spent (i) in filing a complaint by a private organization before the Secretary of Transportation alleging a violation of Title VI, (ii) in aiding the investigation of the complaint by the Secretary and upon a finding by him of a potential *prima facie* violation of Title VI, (iii) in negotiating a mitigation plan. This time was spent in the procedure provided by 23 C.F.R.

§§ 21.11, 21.12 under the *proviso* in 42 U.S.C. § 2000d-1. Section 1988 contemplates recovery of attorney fees for time spent on the litigation, including such discrete portion of time spent in a prior administrative proceeding that ordinarily would have been required to be spent on the litigation prior to filing the complaint in court. Here there was no litigation in court to enforce Title VI in which Respondents were a party or prevailed. Where the Respondents can be said to have "prevailed" was in the informal procedure provided by 23 C.F.R. §§ 21.11, 21.12 under the *proviso* of 42 U.S.C. § 2000d-1, not in an action or proceeding to enforce Title VI as contemplated by Section 1988.

By its language and legislative history Section 1988, as amended, is remedial only and intended only to complement the civil rights statutes and aid in their enforcement. It was not intended to create a private right of action to recover attorney fees in an independent civil action.

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ARGUMENT

CONGRESS DID NOT INTEND THE CIVIL RIGHTS ATTORNEY'S FEES AWARD ACT OF 1976, 42 U.S.C. § 1988, TO AUTHORIZE RECOVERY OF ATTORNEY FEES BY PREVAILING PARTIES FOR REPRESENTATION IN A FEDERAL ADMINISTRATIVE PROCEEDING UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. § 2000d, FOR TIME NOT EXPENDED ON A JUDICIAL PROCEEDING IN COURT.

As a general rule a prevailing litigant is not entitled to recover attorney fees from his adversary except as may

be authorized by statute. *Alyeska Pipeline Service Co. v. The Wilderness Society,* 421 U.S. 240 (1975). The *Alyeska* opinion notes on page 260 that "(w)hat Congress has done, however, while fully recognizing and accepting the general rule, is to make specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights." The opinion further notes that Congress has made such provisions for allowance of attorneys' fees in the enforcement of some civil rights statutes but not in others. In order to remedy this disparity Congress enacted the Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. § 1988. S. Rep. No. 94-1011, 94th Cong., 2nd Sess. 2 (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 5908.

In its opinion in this case, the Court of Appeals construed the statutory language of Section 1988 to explicitly cover the claim of the Respondents. *Crest Street Community v. N. C. Dept. of Transp.,* 769 F.2d 1025, 1028 (4th Cir. 1985). Petitioners disagree. In the language of Section 1988 Congress has not made specific and explicit provision for the recovery of attorney fees by the prevailing party in administrative proceedings to enforce Title VI. Other federal decisions support Petitioners' view of the language of the statute. In *Blow v. Lascaris,* 668 F.2d 670, 671 (2nd Cir. 1982) *cert. denied,* 459 U.S. 914 (1982) (2nd Cir. 1982) the opinion states "the language of this provision (Section 1988) appears, on its face, however, to refer only to a proceeding or action in a court, not to a state administrative proceeding." And in *Latino Project, Inc. v. City of Camden,* 701 F.2d 262, 264 (3d Cir. 1983), the Court stated "(d)espite the literal ambiguity of the words 'civil action or proceeding', the statutory context of those

words indicates that Congress intended section 1988 to authorize an award of attorney's fees only to a party who substantially prevails on a civil rights claim in a lawsuit: Specifically, section 1988 provides in any civil action and proceeding . . . the *court* . . . may allow reasonable attorney's fees. (emphasis added). Congress' use of the term 'court' within the same sentence that contains the words 'civil action or proceeding' leads us to believe that Congress had in mind only a lawsuit when it used those words."

Nevertheless, even in context of the statute the term "action or proceeding" is somewhat ambiguous; the word "proceeding" is broad enough to encompass a proceeding other than in court; and it is necessary to go beyond the words of the statute itself to its legislative history and to the enforcement scheme of the particular civil rights statute involved in order to determine the intention of Congress. *New York Gaslight Club, Inc. v. Carey,* 447 U.S. 54 (1980); *Webb v. County Board of Education,* 471 U.S. —, 85 L.Ed.2d 233, 107 S.Ct. — (1985). In examining the legislative history of Section 1988 in the light of the enforcement scheme of Title VI, it generally can be assumed that Congress was aware of its own laws and judicial interpretations of those laws. *Cannon v. University of Chicago,* 441 U.S. 677 (1979).

As pointed out in *Cannon,* at the time Congress was considering enactment of Section 1988, it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination which was enforceable by an action or proceeding in court. 441 U.S. 685, footnotes 6 and 7.

At that time, Title VI expressly provided for enforcement of its Section 601, 42 U.S.C. § 2000d, in several ways.

Its Section 603, 42 U.S.C. § 2000d-2, provided for judicial review of agency action, which includes private enforcement by any person aggrieved in a court. Its Section 602, 42 U.S.C. § 2000d-1, provided for enforcement by the Federal agency administering the Federal-aid program by (i) requiring the issuance of implementing rules, regulations, or orders of general applicability consistent with Title VI; (ii) cutting off Federal-aid "to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply . . ."; and (iii) "by any other means authorized by law." Its Section 602 expressly limited agency enforcement action as follows: "*Provided,* however, that no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means."

The legislative history of Title VI indicated a strong Congressional enforcement policy in favor of seeking compliance by voluntary means. H. Rep. No. 914, 88th Cong., 2nd Sess. (1964), reprinted in 1964 U.S. Code Cong. & Adm. News 2391, 2400. As pointed out by Congressman McCulloch *et al.* in their additional views on H. R. 7152 (at page 2512 of the reprint of H. Rep. No. 914): "Generally, we believe that compliance with the provisions of Title VI can be accomplished through the application of persuasion and common sense." This Congressional policy favoring voluntary compliance was embodied in USDOT's Title VI regulations. 49 C.F.R. Part 21. Neither Title VI nor its USDOT regulations provided a right of private enforcement of Title VI by administrative proceeding before an administrative law judge or USDOT.

The regulations provided merely for agency receipt and investigation of private complaints, notice to the recipient (actual or potential) of whether the resulting investigation indicated a failure to comply, and if it did, encouragement of the recipient to resolve the matter by informal means whenever possible. This procedure was required before any actual agency enforcement action could be commenced. 49 C.F.R. §§ 21.11, 21.12.

Federal decisional authority on Title VI indicated that private relief against a Federal agency which was foot-dragging on enforcement of Title VI was available by court action. In *Adams v. Richardson*, 480 F.2d 1159, 1163 (D.C. Cir. 1973) the opinion states:

> "The Act (Title VI) sets forth two alternative courses of action by which enforcement may be affected. In order to avoid unnecessary invocation of formal enforcement procedures, it includes the proviso that the institution must first be notified and given a chance to comply voluntarily. Although the Act does not provide a specific limit to the time period within which voluntary compliance may be sought, it is clear that a request for voluntary compliance, if not followed by responsive action on the part of the institution within a reasonable time, does not relieve the agency of the responsibility to enforce Title VI by one of the two alternative means contemplated by the statute. A consistent failure to do so is a dereliction of duty reviewable in the courts."

The legislative history of Section 1988, considered in the light of the enforcement scheme and policy of Title VI, does not disclose a Congressional intention to provide for the recovery of attorney fees for representation in an administrative proceeding. S. Rep. No. 94-1011, 94th Cong. 2nd Sess., reprinted in 1976 U.S. Code Cong. & Adm. News. 5908. The report throughout indicates that Congress contemplated an "action or proceeding" in court rather than in an administrative proceeding.

The report indicates the purpose of shifting the burden of attorney fees in Section 1988, as in other attorney fee provisions in the civil rights statutes, was to encourage private enforcement of the civil rights laws by private citizens in the forums available to them. The report notes that Section 1988 follows the language of the attorney fee provisions for enforcement of Titles II and VII of the Civil Rights Act of 1964 and Section 402 of the Voting Rights Act Amendment of 1975. 42 U.S.C. § 2000e-5(k) for enforcement of Title VII and 42 U.S.C. § 1973l(e) for enforcement of the Voting Rights Act provided "in any action or proceeding" while 42 U.S.C. § 2000a-3(b) for the enforcement of Title II provided merely "in any action." No particular reason for choosing the former phrase for the language of Section 1988 was given or appears in the report.

As previously mentioned in this brief, the report notes that Section 1988 was enacted in response to the *Alyeska* decision which essentially held that attorney fees recoverable under the "private attorney general" exception to the general rule must be authorized by statute. We have been unable to find any decisions which authorize the recovery of attorney fees under the "private attorney general" exception to enforce the civil rights laws in an action or proceeding other than in court. Therefore the authorization of the recovery of attorney fees in Section 1988 under a "private attorney general" concept does not imply the authorization of recovery of attorney fees for representation in an administrative proceeding to enforce the civil rights laws listed in Section 1988.

The report speaks in terms of "prevailing parties in *suits*" (i) "in many *cases* . . ., the citizen who must *sue* . . ."; and ". . . to vindicate these rights in *court*." (emphasis supplied). The sentence in the report that "(t)hese fee shifting provisions have been successful in enabling vigorous enforcement of modern civil rights legislation, while at the same time limiting the growth of the enforcement bureaucracy," when viewed in the light of the enforcement scheme of Title VI, is consistent with a policy favoring private enforcement in court rather than in an administrative proceeding.

The decision of the District Court in this case is in accord with the decision in *Latino Project, Inc. v. City of Camden,* 707 F.2d 262 (3d Cir.), and with the rationale of other federal decisions which have not allowed recovery of attorney fees under Section 1988 for representation in proceeding prior to the filing of an action in federal court to enforce one of the civil rights statutes listed in Section 1988. *Derheim v. Hennepin Cty. Bur. of Soc. Serv., Etc.,* 524 F.Supp. 1321 (D. Minn. 1981) aff'd on other grounds, 688 F.2d 66 (8th Cir. 1982); *Blow v. Lascaris,* 668 F.2d 670 (2d Cir. 1982); *Redd v. Lambert,* 674 F.2d 1032 (5th Cir 1982); *Horacek v. Thone,* 710 F.2d 496 (8th Cir. 1983); *Webb v. County Bd. of Educ. of Dyer County, Tenn.,* 715 F.2d 254 (6th Cir. 1983), aff'd 471 U.S. —, 85 L.Ed.2d 233, 107 S.Ct. 1923 (1985). See also *Toner v. C.I.R.,* 629 F.2d 899 (3d Cir. 1980). The decision of the Court of Appeals in this case is in conflict with the federal authority cited above and is erroneous.

In *Latino Project* a non-profit civil rights litigation group submitted an administrative complaint on behalf

of two Hispanic organizations to the Department of Housing and Urban Development (HUD) alleging that the City of Camden discriminated against Hispanics in the allocation and distribution of Community Development Block Grant (CDBG) funds in violation of Title VI and other laws. Although HUD found no violation, the City of Camden approved a revised funding proposal. The litigation group viewed the revised funding to be favorable to its clients and the result of its administrative complaint, and filed a complaint in district court seeking attorney's fees under Section 1988 for its representation. In its opinion the Third Circuit Court of Appeals interpreted the language of the statute and its legislative history to mean that Congress intended Section 1988 to allow recovery of attorney's fees for representation of a prevailing party in an action or proceeding to enforce Title VI in court and not in an administrative proceeding. It held:

> "We conclude that a plaintiff who has not filed a civil complaint on the merits of a claim under one of the civil rights statutes enumerated in 42 U.S.C. § 1988 is not entitled to attorney's fees under section 1988, even though he may have obtained substantial relief in an administrative proceeding."

In the instant case, the Fourth Circuit Court of Appeals disapproved of the reasoning of *Latino Project* and attempted to distinguish it on the basis that no action to enforce Title VI was filed in court while here Respondents filed a motion to intervene with a proposal complaint and "for all practical purposes intervention was permitted." 769 F.2d 1033. It further reasoned, that "if some type of court action were required to trigger § 1988's fee provision, plaintiffs would still have a claim to fees by virtue of their proposed complaint and motion to inter-

vene in the *ECOS* action, . . . defendants in that action recognized plaintiffs' status by including them in the consent judgment . . ., (p)laintiffs were in a comparable position to plaintiff whose suit is settled after merely filing a complaint, and we think such a party would also be considered sufficiently prevailing in a civil 'action' to merit an award of attorney's fees." This view of the proceedings in the *ECOS* case ignores the practical necessity that the *ECOS* injunction first be dissolved before any mitigation plan could be implemented, the terms of the plan agreement required the Respondents to support its dissolution, the validity of the plan agreement depended upon its dissolution, and the wording of the consent judgment is clear that Respondents' role in the *ECOS* action was not a basis for the recovery of attorney fees. The motion to intervene and file a proposed complaint in the *ECOS* case merely served the purpose of putting the moving parties in a position to receive notice of activity in the case, and to better carry out the plan agreement to support dissolution of the injunction. To the extent the motion can be viewed as adverse to the defendants in the *ECOS* case, it served as a signal that if, however unlikely, the mitigation plan was withdrawn, or negotiations completely broke down on a fundamental issue while the parties discussed the finishing touches, the movants were prepared, if allowed to intervene, to join sides with the opponents of the freeway. The movants-to-intervene were included in the execution of the consent judgment to dispose of the case entirely, to carry out their agreement in the mitigation plan to support dissolution of the injunction and to make their position clear that any rights to attorney's fees or under Title VI they might have were not prejudiced by their inclusion.

In the *Derheim* case, plaintiff sought recovery of attorney's fees under Section 1988 in an action filed in the District Court, for successful representation in a state administrative proceedings to review the nonrenewal of a foster family home license. For the sake of argument, the District Court assumed the administrative proceeding included and the complaint in the District Court alleged 42 U.S.C. § 1983 grounds. The District Court denied recovery for several reasons including that Congress did not intend to allow recovery for representation in optional state proceedings to enforce the civil rights statutes listed in Section 1988. 524 F.Supp. 1324. On appeal, the Eighth Circuit Court of Appeals affirmed but solely on the grounds that the state administrative proceeding was not one to enforce Section 1983. 688 F.2d 68.

In *Blow* the plaintiff prevailed in a state administrative proceeding upon her claim for a grant of medical assistance to cover the expenses of her son's emergency appendectomy. In a *per curiam* opinion, the Second Circuit Court of Appeals affirmed the dismissal of her complaint filed in district court to recover under Section 1988 for representation in the state administrative proceeding where there was no need to institute a federal court action on the merits. It interpreted the language of Section 1988 and its legislative history to mean that Congress intended the recovery to be for representation in court and not for state administrative proceedings.

In *Redd* plaintiff initially brought suit in state court to enjoin approval of tax assessment rolls until the tax assessment rolls were equalized among the counties on several grounds, including a Section 1983 claim. The trial

court held for plaintiff on several of the state grounds and on the Section 1983 claim and it awarded attorney fees under Section 1988. The state appellate court affirmed on the state grounds but ruled the state court lacked jurisdiction over the Section 1983 claim and reversed the award of attorney fees. Plaintiff then filed suit in District Court to relitigate its Section 1983 claim and to recover attorney fees under Section 1988 for their successful prosecution of the state court action. The Fifth Circuit Court of Appeals ruled that the Section 1983 claim was *res judicata* and that there could be no recovery under Section 1988 because there was no state court proceeding to enforce a provision of Section 1983 in which the plaintiffs could have prevailed.

In *Horacek* an attorney was appointed by a state court as a guardian ad litem to represent the interests of an inmate of a mental health facility in a proceeding before a State department to determine whether the inmate should be relocated from the central State facility to a community-based one. The proceedings were required by a consent decree in an action in federal District Court on an issue of whether conditions of confinement and the central State facility were violative of the Eighth Amendment's ban on cruel and unusual punishment. After denial of attorney fees at the state level, the attorney appointed applied in the federal action for attorney fees under Section 1988 for his representation in the state proceedings. The application was denied and on appeal, one of the reasons the Eighth Circuit Court of Appeals affirmed was that the non-mandatory state proceedings were not contemplated by Section 1988.

In *Garcia* a recipient of whose benefits under Title XX of the Social Security Act, 42 U.S.C. § 1397, had been terminated, successfully prevailed in a state administrative proceeding which included a Section 1983 claim and had her eligibility restored without filing a civil complaint on the merits. The settlement of the administrative proceeding contained an express reservation for counsel to seek attorney's fees. The recipient then filed a complaint in federal District Court to recover attorney fees under Section 1988, which was dismissed. On appeal the Tenth Circuit Court of Appeals, followed what it regarded as the weight of authority (*Webb* had not been decided by the Supreme Court at that time) and affirmed.

In *Webb,* a tenured black school teacher whose employment had been terminated was represented by counsel in State statutory proceedings before his school board on the charges and specific causes of his dismissal. At the board hearings the teacher presented evidence that his dismissal was racially motivated and unjustified. He also claimed his constitutional rights had been violated for failure to provide him with written charges or a pretermination hearing. The board finally decided to adhere to its decision to dismiss him, and the teacher then filed an action in federal District Court alleging that various civil rights statutes listed in Section 1988 had been violated in his dismissal and afforded him relief. As a result of his filing the action in court, settlement was quickly accomplished by consent judgment awarding damages, reinstating him, treating him as having resigned on the date of his dismissal and removing adverse comments about him from his employment file. He applied for allowance of attorney's fees under Section 1988 for time spent in the

school board proceeding and in the court action. The District Court excluded the time spent in the school board proceeding, but allowed recovery for the time spent on the litigation in court. The Supreme Court affirmed. Relying on *Hensley v. Eckerhart,* 461 U.S. 424 (1983), it held that "(t)he time that is compensable under § 1988 is that 'reasonably expended *on the litigation.*' Id. at 433, 76 L. Ed. 40, 1035 S.Ct. 1933 (emphasis added). When the attorney's fee is allowed 'as part of the costs' to use the language of the statute—it is difficult to treat time spent years before the complaint was filed as having been 'expended on the litigation' or to be fairly comprehended as 'part of the costs' of the civil action." Had there been the necessary evidence in the record, apparently it would have allowed recovery for time for "any discrete portion of the work product from the administrative proceedings (which) was work that was both useful and of a type ordinarily necessary to advance the civil rights litigation to the stage it reached before settlement."

Because 42 U.S.C. § 2000e-5(k) is one of the civil rights attorney's fee provisions upon which Section 1988 was patterned and the similarity of language between the two statutes, the Fourth Circuit Court of Appeals in its decision below viewed the opinion in *New York Gaslight Club, Inc., v. Carey,* 447 U.S. 54, as very persuasive if not controlling. This view of Section 1988 was rejected in the *Webb* decision, 85 L.Ed.2d 244, in the *Latino Project* decision, 701 F.2d 264, in the *Derheim* decision, 524 F.Supp. 1323, in the *Redd* decision, 674 F.2d 1036, in the *Horacek* decision, 710 F.2d 499, and in the *Garcia* decision, 729 F. 2d 692, because of the different enforcement scheme provided for Title VII from that provided for under the civil

rights statutes listed in Section 1988. *Carey* held that, because of the enforcement scheme Congress provided for Title VII of mandatory state administrative and court proceedings, it intended to allow recovery for representation in such proceedings. As described earlier herein, such an enforcement scheme does not exist for Title VI so that the line of reasoning in *Carey* allowing recovery of attorney fees for representation in administrative proceeding does not follow for recovery under Section 1988.

To an extent the opinions in *N.A.A.C.P. v. Wilmington Medical Center, Inc.,* 689 F.2d 1161 (3d Cir. 1982), *Ciechon v. City of Chicago,* 686 F.2d 511 (7th Cir. 1982) and *Lampher v. Zagel,* 755 F.2d 99 (7th Cir. 1985) are factually distinguishable from the *Webb* decision and these decisions can be reconciled with *Webb* and the decisions from other circuits not allowing recovery for time spent in prior administrative proceedings. In *Wilmington Medical Center, Inc.,* plaintiffs filed a complaint in federal District Court alleging a violation of Title VI in the relocation of sites for the provision of patient services which had a discriminatory effect on the basis of race, national origin and physical handicap. The Center's selection was approved by the Department of Health, Education and Welfare (HEW) and its implementation would be federally funded. The District Court temporarily stayed the action and ordered HEW to conduct a civil rights investigation. From its investigation, HEW concluded that the proposed plan constituted a *prima facie* violation of Title VI. As a result HEW and the Center negotiated a modified plan which was more favorable to plaintiffs. The defendants ultimately prevailed in the litigation under the modified plan. The opinion holds that plaintiffs were entitled to

recover attorney fees under Section 1988 for their efforts leading up to the modification plan, including their efforts in the negotiations between HEW and the Center which resulted in the modified plan, as part of the costs of the action. The investigatory proceeding and the negotiations for a modified plan were caused by the action in court and time spent by plaintiffs in aid thereof was on the litigation. In *Ciechon,* plaintiff brought a Section 1983 action in federal District Court which resulted in a temporary restraining order reinstating her on the City payroll pending an administrative hearing and decision on the changes for which she had been discharged. After the administrative hearing, the City reaffirmed its decision. The District Court held for the plaintiff and ordered her reinstatement with back pay. Plaintiff was allowed to recover attorney fees under Section 1988 including for time spent in the administrative hearing. The administrative hearing was caused by the action in court and time spent there was on the litigation. In *Lampher* plaintiffs brought a Section 1983 and Section 1985 suit in federal District Court seeking declaration that an Illinois statute was unconstitutional. The District Court abstained until a related subsequently filed state court action brought by the defendants against the plaintiffs was terminated. Ultimately the statute was declared unconstitutional in the state court action. Subsequently the District Court also held the statute unconstitutional and awarded the plaintiffs' attorney fees under Section 1988 for time spent in both the federal and state actions. The state action was caused by the federal action, and time spent in the state action was on the litigation.

In the instant case, the "administrative proceedings" was not the result of an action filed in court and time for

representation in filing the administrative complaint, in aiding the investigation and negotiating the mitigation plan was not on the litigation.

THE CIVIL RIGHTS ATTORNEY'S FEES AWARD ACT OF 1976, 42 U.S.C. § 1988, DOES NOT GIVE PREVAILING PARTIES IN AN ADMINISTRATIVE PROCEEDING UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. §2000d, A RIGHT TO BRING AN INDEPENDENT CIVIL ACTION TO RECOVER ATTORNEY FEES.

If Respondents can recover attorney fees under Section 1988 for the time spent in representation in the administrative proceeding under Title VI *per se* under the circumstances of this case, because one can only recover in a court as part of the costs of the action and not in the administrative proceeding itself, the issue of whether Section 1988 creates a right to bring an independent civil action to recover attorney fees appears to be subsumed in the answer to the first question presented in the brief. If Respondents can recover for time spent on the motion to intervene and the consent judgment in the *ECOS* case, and for all or some part of the time spent on the administrative proceeding under Title VI because of the *ECOS* case representation, the issue of whether Respondents can do so in an independent action remains open to be decided.

Several federal decisions have held that no private right of action exists under Section 1988. *Derheim v. Hennepin Cty. Bur. of Soc. Serv., Etc.,* 524 F.Supp. 1321, 1325

(D. Minn. 1981), aff'd on other grounds, 688 F.2d 66 (8th Cir. 1982); *Estes v. Tuscaloosa County, Ala.,* 696 F.2d 898, 901. *Horacek v. Thone,* 710 F.2d 496, 499 (8th Cir. 1983). *Redd v. Lambert,* 674 F.2d 1032, 1036 (5th Cir. 1982) declined to rule on the issue. *Moor v. County of Alameda,* 411 U.S. 693 (1973), decided before Civil Rights Attorney's Fees Award Act of 1976 amendment, held Section 1988 did not provide a private party cause of action because it was remedial and intended to complement the various acts which do create federal causes of action for the violation of federal civil rights laws. The attorney's fee amendment is similarly remedial and intended. By the language of the act itself, recovery is allowed as "part of the costs," clearly meaning the costs of the action to enforce one of the civil rights laws listed in the statute, not an independent one. Furthermore, its legislative history recites that the amendment was intended to "provide the familiar remedy" of reasonable counsel fees. S. Rep. No. 94-1011, 94th Cong. 2d Sess. 2 (1976) reprinted in 1976, U.S. Code Cong. & Adm. News 5908, 5909-10.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court reverse the decision of the Fourth Circuit Court of Appeals in this case and affirm the decision of the District Court.

Respectfully submitted, this the 2nd day of April, 1986.

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In The

Supreme Court of the United States

October Term, 1985

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, NORTH CAROLINA BOARD OF TRANSPORTATION, and JAMES E. HARRINGTON, as Secretary of the North Carolina Department of Transportation and Chairman of the North Carolina Board of Transportation,

Petitioners,

v.

CREST STREET COMMUNITY COUNCIL, INC., RESIDENTS OF CREST STREET COMMUNITY, and SAVE OUR CHURCH and COMMUNITY COMMITTEE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

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STATEMENT OF THE CASE

This case presents the issue of whether attorney's fees may be recovered under 42 U.S.C. Section 1988 for representation in a federal Title VI administrative proceeding. In this case respondents were the primary prosecuting parties in a lengthy, contested, federal Title VI administrative proceeding. The repeated factual claim by amicus, who did not participate in the administrative proceeding, that respondents played a limited, peripheral role in an informal setting is incorrect and does not provide an accurate factual basis for the adjudication of this case (*See, e.g.* Am.Br. 11). Therefore, it is necessary for respondents to set forth the following statement of the case.

Respondents are civic and church organizations representing the Crest Street Community, a long-established, cohesive, black neighborhood in Durham, North Carolina.[1] For many years petitioner North Carolina Department of Transportation[2] proposed extending a freeway through the Crest Street Community with a major interchange in the midst of the community (J.A. 68-69). The proposed extension was a federal-aid highway project with 75% of the costs to be paid by federal funds (J.A. 57). The administrative proceeding in this case concerned respondents' complaint that their rights under Title VI were being violated by petitioners' planning and construction of this federally funded freeway.

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1. The Residents of Crest Street Community and the Save Our Church and Community Committee are unincorporated associations representing the interests of the residents of Crest Street Community and the New Bethel Missionary Baptist Church, which is located within the Crest Street Community. In 1980 the Crest Street Community Council, Inc. was incorporated and assumed the functions of these two associations. Other than this affiliation, there are no parent companies, subsidiaries or affiliates of the Crest Street Community Council, Inc.

2. The other petitioners are the governing board and officials of the North Carolina Department of Transportation.

As proposed, extension of the freeway would have destroyed the Crest Street Community; the freeway right of way would have displaced the community church and park and more than half of the residents, and the remaining residents would have been isolated in fragments likely to be quickly consumed by commercial development (J.A. 68-69).

For several years plans for the extension remained dormant; then, in 1976, petitioners resumed active planning for the project (J.A. 56, 68). In March 1977, respondents retained the North Central Legal Assistance Program to represent them concerning petitioners' planning and construction of the freeway and remedial efforts to mitigate the adverse impact of the project[3] (J.A. 69). During 1977 and 1978, respondents expressed their opposition to construction of the freeway through the Crest Street Community, but petitioners proceeded with issuing a revised draft Environmental Impact Statement for the project (J.A. 57).

After petitioners issued this revised draft Environmental Impact Statement, respondents, in September 1978, filed an administrative complaint with the United States Department of Transportation (USDOT), pursuant to USDOT's Title VI regulations, 49 CFR Section 21 *et seq.* (J.A. 70). The complaint alleged that petitioners' actions violated Title VI and sought rejection of petitioners' revised Environmental Impact Statement and prohibition of further planning or construction of the project until petitioners complied with Title VI[4] (J.A. 88-89).

3. The North Central Legal Assistance Program, a nonprofit corporation which is funded by the Legal Services Corporation, provides legal representation to low-income persons.

4. The primary claims in the complaint were under Title VI. The complaint also challenged the project under the Na-

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USDOT investigated the administrative complaint, conducting a field investigation, meeting with petitioners' staff and with respondents, and receiving extensive documents from petitioners and respondents (J.A. 58). On February 20, 1980, USDOT issued a preliminary finding of reasonable cause that construction of the freeway as proposed in petitioners' revised Environmental Impact Statement would constitute a prima facie violation of Title VI and USDOT Title VI regulations (J.A. 97-99).

USDOT urged petitioners and respondents to attempt to mediate the issues raised by the administrative complaint and accordingly, such negotiations were begun[5] (J.A. 108). Respondents carried out the negotiations in support of the administrative complaint, advising USDOT of the progress. (*See*, letters from respondents' counsel to USDOT. *In* Documents received by petitioners under the Freedom of Information Act and filed with the district court (hereinafter "FIAR"), 206-07, 212, 213-14.) After twenty separate negotiation sessions occurring over a period of fifteen months, respondents and petitioners, in February 1982, reached a preliminary agreement on resolution of the administrative complaint and negotiations continued toward a final agreement (J.A. 37-48, 58-59)[6].

While negotiations continued, petitioners moved, in August 1982, to dissolve an order enjoining construction of

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tional Environmental Policy Act, 42 U.S.C. Section 4331, the Federal-Aid Highway Act, 23 U.S.C. Section 109 and Title VIII of the Civil Rights Act of 1968 (fair housing), 42 U.S.C. Section 3601.

5. See 42 U.S.C. Section 2000d-1 and 49 C.F.R. Sections 21.11(d)(1) and 21.13(a) regarding conciliating Title VI complaints.

6. The City of Durham also participated in these negotiations, with an expectation of acting functionally as petitioners'

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the freeway, entered in *ECOS, Inc. v. Brinegar*, No. C-352-D-72 (M.D. N.C. Feb. 20, 1973)[7] (J.A. 71). Respondents and Willie Patterson, a Crest Street Community resident, moved to intervene in the *ECOS* action and filed a proposed complaint asserting the Title VI violations and other claims raised in the administrative complaint. *Id.*[8]

(Continued from previous page)

agent in implementing the ultimately agreed upon Mitigation Plan. Under the plan the City was released by petitioners from the requirement to pay part of the right of way costs on the condition that the City use these monies along with Community Development Block Grant funds to help carry out the Mitigation Plan.

7. In the *ECOS* action, several organizations and individuals challenged construction of part of the freeway, including the portion proposed through the Crest Street Community, alleging violations of the Federal-Aid Highway Act, 24 U.S.C. Section 128, 138. 49 U.S.C. Section 1653(f) (parkland preservation) and the National Environmental Policy Act of 1969, 42 U.S.C. Section 4332. Petitioners were enjoined from taking steps toward construction of this section of the freeway until petitioners complied with these statutes.

8. During negotiation of the settlement of the administrative complaint petitioners and respondents agreed that respondents would not oppose Federal Highway Administration approval of the EIS while negotiations were still ongoing, on the condition that the EIS would not be submitted to the federal court for approval until the settlement was concluded. *See*, Res. App. 2-3 N. C. Dept. of Transportation memorandum regarding meeting with respondents: "The state would have to agree not to present the EIS to the Court until the details of the [mitigation] plan had been worked out and the residents had been informed of their specific options and approved the plan. Bill Caddell, (Assistant State Highway Administrator) said that he saw no problem with handling the plan in that manner." Respondents subsequently confirmed this agreement in a letter to petitioners: " . . . a document setting out the details of the mitigation plan will be prepared and agreed upon by the parties prior to submission of the environmental impact statement to the federal court." (Res. App. 4 [letter from Michael D. Calhoun to William F. Caddell, Jr. and Barry L. DelCastilho, dated June 11, 1982].) Petitioners' records show that the letter was received: "June 14—Received letter from Crest St. At-

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While respondents' motion for intervention was pending, respondents continued negotiations with petitioners. After an additional twenty two and one-half hours of negotiations in six separate sessions, the parties agreed upon a Final Mitigation Plan and the City of Durham and petitioners agreed upon a Municipal Agreement setting out the respective duties of petitioners and the City in implementing the Mitigation Plan (J.A. 51, 52, 71). The Final Mitigation Plan recites that respondents agreed to withdraw their administrative complaint and support dissolution of the *ECOS* injunction in exchange for petitioners' and the City's agreement to implement the Final Mitigation Plan (J.A. 109).

On December 14, 1982, the district court entered a consent judgment in the *ECOS* action. The judgment recites that petitioners and respondents had resolved their dispute by agreement (the Final Mitigation Plan) (J.A. 155). The judgment dissolved the injunction, dismissed the ac-

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torney confirming agreement reached on mitigation plan . . . ." (Res.App. 6) [N. C. Dept. of Transportation file memorandum]. Notwithstanding this confirmed agreement, petitioners unexplainedly submitted the EIS to the court prior to settlement of the administrative complaint. It was this action which triggered respondents' motion to intervene. These documents were not presented to the district court below because petitioners did not contest respondents' status as prevailing parties in the *ECOS* action. Rather, petitioners filed a motion to dismiss based on other grounds (J.A. 158-9). The district court improperly treated this motion to dismiss as a motion for summary judgment and an attack on respondents' status as prevailing parties in the *ECOS* action without notice to respondents that it was doing so. These documents are pointed out now to show that the district court's error was prejudicial to respondents and, if there is any doubt as to respondents' status as prevailing parties in the *ECOS* action and this status affects the determination of this case, the case should be remanded for determination of this status. (Respondents previously raised this issue before the Court of Appeals (Appellants' Brief, 23-30).).

tion and dismissed with prejudice, respondents' Title VI and other claims, conditioned on petitioners' implementing the Final Mitigation Plan[9] (J.A. 153-57). The following day formal execution of the Final Mitigation Plan and Municipal Agreement by respondents, petitioners and the City of Durham took place at a public ceremony (J.A. 71). USDOT was not a party to the consent judgment or the Final Mitigation Plan settlement agreement (J.A. 153-57, 71).

Under the terms of the Final Mitigation Plan, the respondents were accorded substantial relief. First, the petitioners moved the right of way for the freeway and modified the design of the interchange in the Crest Street Community so as to preserve the community church and park and to provide sufficient land for a new community site. Second, a new community was developed on a tract consisting of part of the old community and land immediately adjacent to it. This allowed the community to remain intact. In the new community housing, streets and recreational facilities are dramatically improved. Most of the relief accorded to respondents was provided by the petitioners. The petitioners released the City of Durham from its obligation to pay an estimated 2.75 million dollars for right of way costs for the freeway, on the condition that the City use these and additional funds in the mitigation efforts.[10] In addition, the petitioners provided direct benefits to respondents, above and beyond regular relocation benefits, at an estimated cost of more than three million dollars (Pet.App. 26-27).

9. Petitioners assert in their statement of the case that "The application for intervention was not allowed. . . ." (Pet. Br. 6) This assertion is incorrect. The district court did not specifically rule on the intervention motion. The intervenors, though, became parties by virtue of the consent judgment, which both petitioners and respondents signed. The consent judgment adjudicated the claims between petitioners and respondents, dismissing with prejudice respondents' Title VI and other claims, conditioned upon petitioners' implementation of the Final Mitigation Plan (J.A. 153-57).

Both the Final Mitigation Plan and the *ECOS* Consent Judgment specifically reserved respondents' claim for attorney's fees (J.A. 129, 155). Respondents subsequently submitted to the petitioners a request for payment of attorney's fees, accompanied by a detailed listing of expenses and hours (J.A. 59-60). This request was denied by petitioners and respondents filed this action on November 30, 1983, to recover the requested attorney's fees and expenses (J.A. 3, 59-60).

The action came before the District Court on respondents' motion for summary judgment and petitioners' motion to dismiss[11] (J.A. 66-159). The district court denied respondents' claim for fees for the Title VI federal administrative proceeding because the court concluded that Section 1988 did not authorize fees for administrative proceedings (Pet.App. 36). The district court also denied respondents' claim for fees for the *ECOS* action because the court concluded that the respondents were not prevailing parties in that litigation.[12] *Id.* at 266.

10. The City had previously tried to spend substantial Community Development Block Grant funds in the Crest Street Community but HUD blocked the use of the funds due to petitioners' plans to build the freeway through the community (FIAR 85-89).

11. Petitioners filed a motion to dismiss, which the district court treated as a motion for summary judgment, though the district court did not give notice to respondents that it was doing so. As explained *supra* at 4-5 n.8, respondents were prejudiced by this error.

12. The district court reached this conclusion notwithstanding that petitioners in their motion to dismiss did not con-

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The Court of Appeals reversed, finding, that Section 1988 did apply to administrative proceedings and that respondents' claim was explicitly authorized by Section 1988 (Pet.App. 8). The court found that respondents were " 'prevailing parties' in a 'proceeding to enforce . . . title VI of the Civil Rights Act of 1964' " within the meaning of Section 1988 (Pet.App. 7). The court remanded the action to the district court for a determination of the amount of attorney's fees (Pet.App. 21).

Petitioners and respondents subsequently agreed that $98,571.63 was a reasonable amount of fees under the Court of Appeals' order and the parties executed a consent judgment to this effect, which was entered by the district court on February 7, 1986.[13]

SUMMARY OF ARGUMENT

Respondents' claim for attorney's fees for representation in a federal Title VI administrative proceeding is explicitly authorized by Section 1988. Section 1988 provides for attorney's fees for a "prevailing party" in an "action or proceeding to enforce . . . title VI of the Civil Rights Act of 1964." Respondents meet all of these requirements and thus they are entitled to recover attorney's fees.

First, respondents meet the requirement that the representation for which they seek fees occur in an "action of proceeding." The statutory language of Section 1988,

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tend that respondents were not prevailing parties in the *ECOS* action. The petitioners' motion to dismiss raised only the following defenses: lack of jurisdiction; Eleventh Amendment immunity; failure to state a claim; lack of standing; and failure to exhaust administrative remedies (J.A. 159-160).

13. The judgment is, of course, contingent upon this Court's action in the case.

this Courts' holding in *New York Gaslight Club v. Carey*, 447 U.S. 54 (1980), and the legislative history of Section 1988 establish an administrative proceeding is a "proceeding" within the meaning of Section 1988. Furthermore, the actions before the agency in this case constituted a "proceeding" within the meaning of Section 1988.

Beginning with the statutory language enacted by Congress, the language in Section 1988 is broad, providing for fee recoveries in "any action or proceeding." This Court in *Carey*, viewing identical language in the Title VII attorney's fees provision upon which Section 1988 was patterned, found that these words evidenced a clear Congressional intent to authorize the recovery of attorney's fees for representation in administrative proceedings. The legislative history of Section 1988 confirms that Congress likewise meant what it said when it enacted Section 1988. During the debate on Section 1988, Senator Helms, who helped lead the opposition to the bill, offered a printed amendment to reduce the coverage of the bill by deleting the words "or proceedings." The amendment was defeated by a wide margin in a recorded vote. None of the legislative history evidences a Congressional intent to nullify the word "proceeding." The legislative history does generally refer to court actions and suits in court, but these references merely reflect the fact that court actions are the most typical means of enforcing civil rights and therefore it is to be expected that these would be the terms used in the legislative discussion. Finally, if there was any doubt as to the meaning of Section 1988, in the Senate Report Congress specifically directed the courts to apply Section 1988 broadly. Thus, through the statutory language and the legislative history Congress manifested its intent to include administrative proceedings within the coverage of Section 1988.

Moreover, in this particular case the actions before the administrative agency constituted a "proceeding" within the meaning of Section 1988. The actions spanned a period of more than four years and included: respondents' filing a detailed formal complaint with the agency; a formal investigation by the agency; a finding of probable cause that Title VI was violated; extensive negotiations between respondents and petitioners; and execution of a formal settlement document, which resolved the complaint. These actions fall within the usual meaning of the word proceeding, which includes all procedures used by the agency to carry out its statutory duties and is not limited to agency hearings. Furthermore, the requirement in Title VI that the agency attempt to conciliate the dispute before implementing involuntary enforcement orders does not change the normal meaning of the word proceeding and does not limit fee awards for Title VI administrative proceedings to cases which are not resolved through conciliation, but rather require an agency hearing. Limiting the application of Section 1988 in this way would contradict this Courts' analysis in *Carey*. This Court in *Carey*, construing Title VII, which also mandates conciliation, found that the agency proceeding encompassed procedures prior to the hearing stage, including the agency investigation and the conciliation efforts. Limiting fee awards to cases in which agency hearings are held also would contradict the directive in the legislative history of Section 1988 to encourage settlements by awarding fees to those who obtain relief through prehearing settlements.

Respondents further meet the requirement of Section 1988 that the proceeding for which they seek fees be one "to enforce the provisions . . . of title VI of the Civil Rights Act of 1964 . . ." Title VI mandated that all agencies promulgate regulations to enforce Title VI. The agency procedures in this case were carried out under regulations specifically issued pursuant to Title VI and the primary issue in this administrative proceeding was respondents' claim that petitioners were violating respondents' rights under Title VI.

Respondents also meet the final requirement of Section 1988 that they be a "prevailing party." First, respondents meet the requirement that they be a "party." Petitioners have never contested, in either the courts below or in this Court, the fact that respondents were a party in the administrative proceeding. Usually this Court does not even consider a matter, such as *amicus'* assertion that respondents were not parties to the administrative proceeding, unless it was brought forward *both* in the courts below and in the petition to this Court. However, if the Court chooses to consider amicus' argument, it is clear that respondents were in fact not only a party to the administrative proceeding, but with the agencies' encouragement, they were the primary prosecuting party in the proceeding. Respondents initiated the administrative proceeding by the filing of their complaint, which set out in detail the legal and factual bases of the Title VI violation. They provided the agency with extensive materials which documented the violation. Then, after the finding of a probable Title VI violation, the respondents carried out the negotiations on behalf of the complaint and drafted the settlement document, advising the agency of the progress of the negotiations. Finally, it was respondents who signed with petitioners the settlement document, which resolved the complaint and concluded the administrative proceeding; the agency itself did not sign the settlement document. The events in this case show that both the agency and petitioner accorded party status to respondents.

While complainants under the Title VI regulations in this case may have limited procedural rights, such limitations also apply to complainants under the federal Title VII regulations and complainants under the state Title VII agency regulations, complainants which this Court in *Carey* found were parties for purposes of the attorney's fee provision. Under both Title VI and Title VII the agency performs a dual function, enforcing both the civil rights of the complainant and the broader public interest, as the agency perceives it. These limitations on complainants' procedural rights insure that if the goals of the complainant and the agency conflict, the agency can pursue its goals, though frequently, as in this case, there will be no conflict. These procedural limitations do not, just as they did not in *Carey,* disqualify respondents from recovering attorney's fees. Respondents also meet the further requirement that they be the party who prevailed. The settlement document shows, and petitioners concede, that respondents recovered substantial relief as a direct result of respondents' efforts in the administrative proceeding.

Thus, as shown above, Section 1988 explicitly authorizes respondents' recovery of attorney's fees, for respondents meet all of the requirements of the statutory language of Section 1988. Moreover, awarding attorney's fees in cases such as this one not only carries out the statutory language of Section 1988, it also furthers the Congressional goals of assisting the enforcement of civil rights encouraging the settlement of civil rights disputes, which both Congress and this Court have strongly endorsed. First, Congress found that attorney's fees were an essential part of the remedy for civil rights violations, for otherwise victims of discrimination would be unable to secure attorneys to enforce their civil rights. This case demonstrates well

the need for such attorneys for it is unlikely that respondents' civil rights would have been enforced in the administrative forum without the assistance of an attorney. Providing attorneys for complainants also assists the civil rights enforcement efforts of agencies, which typcially have very limited resources. As shown in this case, complainants' attorneys can provide valuable assistance in documenting civil rights violations and, perhaps most importantly, in conciliating disputes. Complainants are much more likely to agree to settlements, which reduce the workload of the federal courts, if complainants are secure that their rights have been protected by their own attorney. Settlements are also encouraged because the party charged with discrimination faces the possibility of having to pay to the complainant an attorney's fee award. The possibility of such an award enhances the prospect that the party will earnestly explore settlement prospects at the earliest opportunity.

Finally, as a matter of procedure complainants must be able to bring an independent court action for the recovery of attorney fees for administrative representation. To hold otherwise would make the recovery of such fees dependent on whether by happenstance the case required the complainant to bring a federal court action on the civil rights claim itself. It would also mean that the complainant who was successful in the administrative forum would be denied fees while the unsuccessful administrative complainant who did not prevail until after a federal court action would recover fees. This Court in *Carey,* considering this same issue under Title VII, specifically authorized an independent action to recover administrative fees, finding that a contrary holding would produce an anomalous and unacceptable result.

ARGUMENT

I. SECTION 1988 EXPLICITLY AUTHORIZES RESPONDENTS' CLAIM FOR ATTORNEY'S FEES FOR REPRESENTATION IN A TITLE VI FEDERAL ADMINISTRATIVE PROCEEDING AND A RELATED FEDERAL COURT ACTION.

This case presents a simple issue. Respondents' claim for attorney's fees for representation in a Title VI federal administrative proceeding falls explicitly within the fee authorization of 42 U.S.C. Section 1988.[14] Congress amended Section 1988 by enacting The Civil Rights Attorney's Fee Award Act of 1976 which added the following fee authorization:

> In any action or proceeding to enforce a provision of Sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318 or title VI of the Civil Rights Act of 1964, the court in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. 42 U.S.C. Section 1988.

Section 1988, as the court of appeals below concluded, explicitly covers respondents' claim for attorney's fees: "Respondents have demonstrated they were 'prevailing parties' in a 'proceeding . . . to enforce title VI of the Civil Rights Act of 1964.' " (Pet.App. 8).

As is shown in the following subsections, respondents meet all of the requirements of Section 1988, specifically: (A) the federal administrative proceeding for which respondents seek fees was a "proceeding" within the meaning of Section 1988; (B) the federal administrative proceeding was one "to enforce . . . title VI"; and (C) respondents were a "prevailing party" in the federal Title VI administrative proceeding. Furthermore, it will be shown that awarding attorney's fees for representation in federal Title VI administrative proceedings such as this one not only carries out the statutory language of Section 1988, it also furthers the Congressional goals of Section 1988 of assisting the enforcement of civil rights and encouraging the settlement of civil rights claims.

14. Respondents' fee claim also includes time spent on a motion to intervene in and the settlement of the *ECOS* court action. As found by the Court of Appeals these hours are also compensable. They are discussed *infra* at 48-49.

A. The Federal Title VI Administrative Proceeding In This Case Was A "Proceeding" Within The Meaning of Section 1988.

Respondents meet the requirement of Section 1988 that the representation for which they seek attorney's fees be representation in an "action or proceeding" within the meaning of Section 1988. First it will be established that the words "action or proceeding" in Section 1988 include agency administrative proceedings. Then it will be shown that the actions before the agency in this particular case were an agency administrative proceeding.

1. Agency Administrative Proceedings Are Included Within The Meaning Of The Phrase "Action or Proceeding" In Section 1988, As Established By The Statutory Language, This Court's Holding In Carey And The Legislative History.

i. The statutory language of Section 1988 establishes that agency administrative proceedings are included within the coverage of Section 1988's fee authorization. In enacting the Section 1988 attorney's fee provision Congress used broad language, including "any action or proceeding" which meets the other requirements of Section 1988. The usual meaning of the word proceeding includes agency administrative proceedings. Black's Law Diction-

ary states that the term proceeding includes "administrative proceedings before agencies, tribunals, bureaus or the like." Black's Law Dictionary 1083 (5th Ed. 1979). Indeed, petitioners concede that "the word 'proceeding' is broad enough to encompass a proceeding other than in court." (Pet.Br. 10).

ii. This Court's holding in *New York Gaslight Club, Inc. v. Carey,* 447 U.S. 54 (1980), establishes that the usual meaning of the word proceeding, which includes agency administrative proceedings, applies to Section 1988. This Court in *Carey* decided the issue of whether the word proceeding in the attorney's fees provision of Title VII included agency administrative proceedings. Section 1988 is patterned after the Title VII attorney's fee provision, Section 706(k), using the identical operative language, as can be seen in a comparison of the two statutes:

Title VII (Section 706(k))

> In any action or proceeding under this title the court, in its discretion, may allow the prevailing party other than the Commission or the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. Section 2000e-5(k)

Section 1988

> In any action or proceeding to enforce a provision of section 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. Section 1988

Finding in *Carey* that attorney's fees for agency administrative proceedings were recoverable, this Court stated:

> The words of § 706(k) leave little doubt that fee awards are authorized for legal work done in "proceedings" other than court actions. Congress' use of the broadly inclusive disjunctive phrase "action or proceeding" indicates an intent to subject the losing party to an award of attorney's fees and costs that include expenses incurred for administrative proceedings. . . . It cannot be assumed that the words "or proceeding" in § 706(k) are mere surplusage. 447 U.S. at 61.

This same broad phrase "any action or proceeding" in Section 1988 includes administrative proceedings, for not only did Congress use the same language in the two fee provisions, Congress specifically indicated for Section 1988, as this Court has noted, that "the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act." *Hensley v. Eckerhart,* 461 U.S. 424, 433 n.7 (1983) quoting S. Rep. No. 1011, 94th Cong. 2d Session 4 (1976).

Petitioners argue that the statutory language evidences a Congressional intent to exclude administrative proceedings from the coverage of Section 1988 because the statute directs "the court" to award the fees (Pet. Br. 10). This directive, however, is patterned after the attorney's fee provision of Title VII, which this Court found in *Carey* to simply designate the procedure for determining the fee award, rather than to evidence a Congressional intent to exclude administrative proceedings from the coverage of the attorney's fee provision. Section 706(k), the attorney's fee provision of Title VII, provides, as does Section 1988, that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . . " This Court, construing in *Carey* the language of Section 706(k), found that: "The words of 706(k) leave little doubt that fee awards are authorized for legal work done in 'proceedings' other than court ac-

tion." 447 U.S. at 61. The Court reached this conclusion notwithstanding the language in 706(k) that it is "the court" which awards the fee. 447 U.S. at 67. The administrative agencies in *Carey* and the instant case lacked the authority to make an award of attorney's fees. 447 U.S. at 47. The attorney's fees provisions of Title VII and Section 1988 provide that authority and specify the procedure for obtaining the award, namely by a petition to a court.

iii. The legislative history of Section 1988 confirms the statutory language which includes administrative proceedings. This Court in *Carey* noted the breadth of the language "any action or proceeding" used by Congress in the attorney's fee provision under Title VII, which is the identical language used in Section 1988. The Court described the language as a "broadly inclusive disjunctive phrase" and found it included administrative proceedings. 447 U.S. at 55. The breadth of this language was noticed also by the opponents of the Civil Rights Attorney's Fee Award Act of 1976 when the legislation was being debated in Congress. During the debate, Senator Helms, who helped lead the opposition to the bill, introduced a printed amendment on the Senate floor to amend the bill by deleting the words "or proceeding".[15] 122 Cong. Rec. 32933 (1976) (Remarks of Sen. Helms). The amendment was defeated by a wide margin in a recorded vote. *Id.*

In addition the legislative history of Section 1988 includes, in the House Report on the bill, citation with

15. Senator Helms and the other senators found the issue straightforward. Senator Helms introduced the amendment saying: "The amendment, as read, speaks for itself and I ask for the yeas and nays"; the vote was then taken without further discussion or debate. 122 Cong. Rec. 32933 (1976) (Remarks of Sen. Helms).

approval to a case in which attorney's fees were explicitly awarded for administrative representation, *Parker v. Matthew,* 411 F.Supp. 1059 (D.D.C. 1976). H.R. Rep. No. 1558, 94th Cong. 2d Sess. 7 (1976) (Hereafter "H.R. Rep."). This case explicitly discusses whether attorney's fees can be recovered for work in an administrative proceeding and finds that they can. The *Parker* court quoted Black's Law Dictionary regarding prevailing parties, emphasizing its application to administrative proceedings: "To be such [a prevailing party] does not depend upon the degree of success at different stages of the suit but whether, at the end of the suit *or other proceeding,* the party who has made a claim against the other has successfully maintained it." 411 F.Supp. at 1063. (emphasis supplied by the court) (quoting Black's Law Dictionary 1352 (4th ed. 1968)).

Also, it is significant that at the time Congress amended Section 1988 to include the attorney's fee provision, many courts had held that administrative remedies under Title VI had to be exhausted prior to the institution of a court action seeking redress under Title VI.[16] Given the broad language of the statute and the remedial goal of the statute, it is inconceivable that Congress intended

16. E.g. *Feliciano v. Ramsey,* 363 F.Supp. 656 (S.D.N.Y. 1973); *Dupree v. City of Chattanooga, Tenn.,* 362 F.Supp. 1136 (E.D. Tenn. 1973); and *Green v. Cauthen,* 379 F.Supp. 361 (D.S.C. 1974). Following the enactment of the Civil Rights Attorney's Fees Award Act of 1976 courts continued to require exhaustion. Ten months before the filing of the administrative complaint in this case, the district court below, *sua sponte,* raised the issue of administrative exhaustion in a Title IX case. *Crawford v. University of North Carolina,* 440 F.Supp. 1047 (M.D.N.C. 1977). The court pointed out that Title IX was patterned after Title VI and, without deciding the exhaustion issue, required the plaintiff under the doctrine of primary jurisdiction, to first file and process a complaint with the agency before the court would review the matter. *Id.* at 1058.

victims of discrimination to shoulder the expense of administrative proceedings when, at the time the Section 1988 attorney's fee provision was enacted, it appeared these proceedings might well be mandatory.

Notwithstanding the broad statutory language which includes administrative proceedings and the above specific references to proceedings in the legislative history, petitioners contend that the references in the legislative history to court actions and suits in court indicate an intent to exclude administrative proceedings from the coverage of Section 1988 (Pet.Br. 10-11). These references, however, merely reflect the fact that the most frequently used means of enforcing civil rights is in the courts. Thus, it is to be expected that the legislative discussion would use these terms. Moreover, this Court only last year, in a case construing the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. Sections 1961-1968, rejected the argument that references in the legislative history to one type of action are sufficient to negate broad statutory language that includes other types of actions. In the case of *Sedima, S.P.R.L. v. Imrex,* 105 S.Ct. 3275 (1985) the defendant argued that the legislative history of RICO referred only to actions against mobsters and organized criminals and thus it should not be construed to authorize actions against legitimate businesses, even though the statutory language included such actions. This Court rejected the argument, quoting with approval, *Haroco, Inc. v. American National Bank and Trust Co. of Chicago,* 747 F.2d 384, 398 (1984), *aff'd.* 105 S.Ct. 3291 (1985):

> The fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth. 105 S.Ct. at 3287. (citation omitted).

In the instant case, the language of Section 1988 is likewise broad and petitioners' attempt to narrow it should, as was the same attempt in *Sedima,* be rejected.

Amicus argues that a comment made by Representative Railsback in the House of Representatives' debate of the Civil Rights Attorney's Fee Award Act of 1976 indicates that Congress intended that the bill exclude Title VI administrative proceedings (Amicus Br. 18). Such isolated comments have generally not been considered to be reliable indicators of Congressional intent. This Court has previously held that isolated statements by members of Congress are "not impressive legislative history." *Garcia v. U.S.,* 105 S.Ct. 479, 484 (1984), *quoting Zuber v. Allen,* 396 U.S. 168, 187 (1969). Giving such statements great credence would, as this Court stated, create a "type of reverse parole evidence rule, where oral statements were elevated above enacted language in determining the meaning of the statute." *Garcia,* at 484.

More importantly, the comment cited by amicus was directed to a separate issue and did not go to the issue of whether Section 1988 was intended to apply to administrative proceedings. In the comment quoted by amicus, Representative Railsback was responding to questions regarding whether including Title VI and Title IX in Section 1988 would determine the unsettled issue of whether there was an implied independent private cause of action under those titles. His answer that "This bill merely creates a remedy in the event the courts determine that an individual may sue under these statutes" can only be read as addressing the question of whether Congress, by passing Section 1988, intended to put its imprimatur on such implied independent actions. 122 Cong. Rec. 35124 (1976) (remarks of Rep. Railsback). Amicus suggests

that this comment means that Congress intended for Section 1988 to be applicable only to such judicially created implied rights under Title VI (Am. Br. 18). That amicus misinterprets this comment is also shown by the fact that amicus' interpretation would deny attorney's fees for other representation for which Section 1988 unquestionably authorizes fees. Title VI explicitly provides in Section 603, and did so at the time these comments were made, a private cause of action by "any person aggrieved" for court review of agency decisions on Title VI administrative complaints. It is beyond peradventure that Section 1988 authorizes fees in such Section 603 court reviews. Under amicus' erroneous reading of this isolated comment, no fees would be allowed for this statutorily authorized judicial review, since such an action would not be a judicially created action.

When the full legislative history of Section 1988 is reviewed, it confirms the statutory language which includes administrative proceedings in the attorney's fee authorization. This is manifested not only by the specific legislative history regarding the word proceeding, but also by the overall goal of Congress expressed in the legislative history. The House Report states: "The effective enforcement of Federal civil rights depends largely on the efforts of private citizens." H.R. Rep. 1. Similarly, the Senate Report states: "The Committee has found that fee awards are essential if the Federal statutes to which [Section 1988] applies are to be fully enforced. We find that the effects of such fee awards are ancillary and incident to securing compliance with these laws, and that fee awards are an integral part of the remedies necessary to obtain such compliance." (footnote omitted) S. Rep. 1011, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S.

Code Cong. & Ad. News, 5908, 5913 (hereafter "S.Rep"). Further, in the legislative history of Section 1988, Congress restated the principle that: "In the civil rights area, Congress has instructed the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights laws." (footnote omitted) S. Rep. at 3. To give effect to the phrase "any action or proceeding" and to carry out the Congressional goal of encouraging the enforcement of the civil rights laws, Section 1988 must be applied to authorize fee awards for representation in administrative proceedings.[17]

iv. Petitioners, in addition to arguing that the phrase "any action or proceeding" does not include administrative proceedings, argue that even if it does, it does not include optional administrative proceedings, such as the one in this case (Pet. Br. 21). This argument is erroneous because it is irreconcilable with the statutory language of Section 1988. Further, this Court's decisions have

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17. Petitioner also argues that this Court decided in *Webb v. Dyer County Board of Education*, 105 S.Ct. 1923 (1983) that Section 1988 only authorized fees for court actions. As petitioner points out, this Court in *Webb* stated: "The time that is compensable under Section 1988 is that 'reasonably expended *on the litigation*'." 105 S.Ct. at 1928, *quoting Hensley v. Eckerhart*, 461 U.S. 424 (1983) (original emphasis). However, this statement was not addressed to the question of whether administrative proceedings are included within the phrase "action or proceeding" in Section 1988. It was addressed to the argument by the petitioner in *Webb* that fees for a state tenure administrative proceeding, which is not covered by Section 1988, should automatically be recoverable because a related Section 1983 court action was subsequently filed and the time spent in the non-fee administrative proceeding was helpful in the fee-covered court action. It does not indicate a general disapproval of recovering fees under Section 1988 for administrative representation. Indeed, in *Webb* the defendant argued specifically that Section 1988 did not apply to administrative proceedings. This Court refused to adopt that argument, which would have disposed of the case. *Id.* at 1932. (Brennan and Blackmun, J.J. concurring in part, dissenting in part).

shown that the mandatory or optional nature of a proceeding does not determine whether it is a proceeding within the meaning of Section 1988.

The statutory language of Section 1988 cannot be reconciled with petitioners' argument that the coverage of the statute is limited to administrative proceedings which are mandatory. First the statute provides for fees in "*any* action or proceeding" (emphasis added). Petitioners' construction of the statute contradicts the word "any." Second, petitioners' argument is tantamount to nullifying the words "or proceeding", since none of the civil rights laws covered by Section 1988 have mandatory administrative proceedings. As this Court stated in *Carey*: "It cannot be assumed that the words 'or proceeding' in Section 706(k) are mere surplusage." 447 U.S. at 61. Significantly, in this case although petitioners argue that Section 1988 does not apply to administrative proceedings, they never suggest anything to which the words "or proceeding" do refer. In effect their unstated argument is that the words are "mere surplusage." The general presumption against construing statutory language as surplusage is applicable to Section 1988, particularly given the previously described unsuccessful attempt of an opponent of the bill, Senator Helms, to delete the phrase "or proceeding" from the bill. To give effect to the words "or proceeding" in Section 1988 these words must be applied to the non-mandatory administrative proceedings in the civil rights laws covered by Section 1988.

Furthermore, this Court's decisions in *Webb v. Board of Education of Dyer County*, 105 S. Ct. 1923 (1985) and *Smith v. Robinson*, 104 S. Ct. 3457 (1984) show that the mandatory or optional nature of a proceeding does not determine whether it is a proceeding within the meaning of

Section 1988.[18] In *Webb*, the plaintiff sought to recover fees for representation in a county school board administrative proceeding, which preceded a Section 1983 federal court action. Plaintiff had argued that the school board hearings "were 'proceeding[s] to enforce a provision of Section 1983 within the meaning of Section 1988"[19] 105 S.Ct. 1927. This Court rejected the claim stating:

> "[T]he school board proceedings in this case simply do not have the same integral function under § 1983 that state administrative proceedings have under Title VII. Congress only authorized the district courts to allow the prevailing party a reasonable attorney's fee in an action or proceeding to enforce [§ 1983]. Administrative proceedings established to enforce tenure rights created by state law simply are not part of the proceedings to enforce § 1983 . . . ." 105 S.Ct. at 1928.

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18. Actually, the administrative proceeding in Carey was only partially mandatory. The title VII complainant is only required to give the state agency the *opportunity* to process the complaint. Two hundred and forty days after the filing of the charge the complainant has an unfettered right to bring a court action, even if the agency is still processing the complaint. In the Carey case fees were authorized for representation in both the mandatory and optional portions of the proceeding. *See, Webb*, 105 S.Ct. at 1928 n.15. (Brennan and Blackmun, J.J., concurring in part and dissenting in part.) The optional/mandatory distinction between Carey and this case is further blurred by the fact, that at the time Section 1988's attorney's fee provision was enacted and at the time this administrative complaint was filed, it appeared that Title VI administrative proceedings might well be mandatory. See *supra* at 19 n.16.

19. The *Webb* petitioner presented two theories of recovery. First, he argued that the county school board hearing was an "action or proceeding to enforce a provision of . . . § 1983." He also argued that if the county school board was not an action or proceeding to enforce Section 1983, the time spent in the hearing should still be recoverable because it was helpful in the subsequent Section 1983 court action. 105 S.Ct. 1927.

The petitioner in *Webb* did not have to exhaust the state tenure proceeding before filing a Section 1983 court action, thus the proceeding was optional. But as Justices Brennan and Blackmun pointed out in their concurring opinion:

> The issue of exhaustion does not bear on the definition of the phrase "action or proceeding", however, but cuts instead to Section 1988's second threshold requirement: fees may be awarded only if the action was pursued to "enforce a provision" of the civil rights law. 105 S.Ct. at 1931. (Brennan and Blackmun, J.J., concurring in part and dissenting in part.)[20]

This point can also be seen in the case of *Smith v. Robinson,* which was cited by the Court in *Webb* when it rejected the argument that the school board proceeding was one to enforce Section 1983. In *Smith* the plaintiff sought fees under Section 1988 for state administrative remedies under the Education of the Handicapped Act (EHA), 20 U.S.C. Section 1400 *et seq.* These proceedings *were* mandatory and had to be exhausted prior to bringing a Section 1983 federal court action. This Court rejected the fee claim, however, because although the proceedings were mandatory, they were mandated by the EHA, a non-fee statute and were not mandated by Section 1983. Thus they were not proceedings to enforce one of the provisions listed in Section 1988, namely, Section 1983.

Hence, *Webb* and *Smith* show that the mandatory or optional nature of a proceeding is irrelevant to the issue

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20. Justices Brennan and Blackmun concurred in the Court's finding that the county school board hearing was not a proceeding to enforce a provision of Section 1983. They dissented from the Court's determination that the claim should not be remanded for an award of fees for the hours in the non-fee proceeding that were necessary and useful to the Section 1983 court action.

of whether the proceeding meets the requirement of Section 1988 that it be an "action or proceeding."

2. The Actions Before The Agency In This Case Constituted An Agency Administrative Proceeding.

As shown in the previous section, agency administrative proceedings are included within the meaning of the word "proceeding" in Section 1988. Respondents' claim for fees thus meets Section 1988's requirement that the claim be for representation in a proceeding, because the actions before the agency in this case constituted an agency administrative proceeding. This is established by the substantial actions before the agency in this case, actions which come within the usual meaning of the word proceeding.

The actions before the agency in this case were extensive. Respondents filed a formal, detailed complaint with the agency (J.A. 73-89). The agency formally investigated the complaint, including conducting a field investigation in North Carolina (J.A. 58). Extensive materials were submitted to the agency by petitioners and respondents (FIAR 158-60). The agency issued a finding of probable cause of a Title VI violation (J.A. 97). More than two dozen negotiation sessions followed (J.A. 35-52). And the proceeding was concluded by the execution of a formal settlement document, which set out in extensive detail the remedial efforts to be taken by petitioners. These events spanned a period of more than four years.

These actions come within the normal meaning of the word proceeding, which is not limited to agency hearings. This is seen in cases applying the word "proceeding" in 18 U.S.C. Section 1505, which prohibits obstructing justice

in a "pending proceeding" before any United States department or agency.[21] In the case of *Rice v. United States,* 356 F.2d 709 (8th Cir. 1966), the court that found the word proceeding included an investigation by the National Labor Relations Board following a complaint by a worker. The defendant argued that the statute did not apply because there was no proceeding. The Court rejected this argument finding that:

> "Proceeding" is a comprehensive term meaning the action of proceeding—a particular step or series of steps, adopted for accomplishing something. This is the dictionary definition as well as the meaning of the term in common parlance. [fn] Proceeding before a governmental department or agency simply means proceeding in the manner and form prescribed for conducting business before the department or agency, including all steps and stages in such an action from its inception to its conclusion. [fn See Webster's Third New International Dictionary] 356 F.2d at 712.

Similarly, the court in *United States v. Browning,* 572 F.2d 720 (10th Cir. 1978), *cert. denied,* 439 U.S. 822 (1978), applied 18 U.S.C. Section 1505 to an inquiry by the Bureau

21. 18 U.S.C. Section 1505 in pertinent part, read as follows at the time the cases cited *infra* were decided:

> Whoever corruptly, or by threats or force or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—shall be fined not more than $5,000 or imprisoned not more than five years, or both.

In 1982, Pub. L. 97-291, amended, *inter alia,* the above language substituting "any pending" for "such" after "law under which", and substituting "any" for "such" before "department" and before "inqury".

of Customs. In *Browning,* the Customs Bureau was investigating the accuracy of price representation on an entry form filed by the defendant. Like the defendant in *Rice,* Browning argued that no "proceeding" was pending at the time of the allegedly illegal actions. The court rejected this argument, finding:

> In sum, the term "proceeding" is not, as one might be inclined to believe, limited to something in the nature of a trial. The growth and expansion of agency activities have resulted in a meaning being given to "proceeding" which is much more inclusive and which no longer limits itself to formal activities in a court of law. Rather, the investigation or search for the true facts such as that described in the indictment here is not to be ruled as a non-proceeding simply because it is preliminary to indictment and trial. 572 F.2d at 724.[22]

Thus, these decisions[23] under 18 U.S.C. Section 1505 show that the meaning of the word proceeding is broad and easily encompasses the actions before the agency in this case.

Petitioners cite the Title VI requirement that agencies seek to conciliate a Title VI violation before imple-

22. All other federal Courts of Appeals' decisions are in accord with the *Rice* and *Browning* decisions: *U.S. v. Fruchtman,* 421 F.2d 1019 (6th Cir. 1970); *U.S. v. Vixie,* 532 F.2d 1277 (9th Cir. 1976); *U.S. v. Abrams,* 427 F.2d 86 (3rd Cir. 1970), *cert. denied,* 400 U.S. 832 (1970); *U.S. v. Sutton,* 732 F.2d 1483 (10th Cir. 1984), *cert. denied,* 105 S.Ct. 903 (1985).

23. These broad interpretations of the word "proceeding" were made notwithstanding the doctrine that criminal statutes should be strictly construed. *Rice,* 356 F.2d at 714; *Dunn v. United States,* 442 U.S. 100, 99 S.Ct. 2190, 60 L.Ed.2d 743 at 112 (1979). In contrast, Section 1988 is a remedial statute enacted to further the enforcement of civil rights and Congress has instructed the courts to apply it broadly.

menting enforcement orders[24] and argue that because this case was settled in the conciliation stage prior to an adjudicatory hearing there was no proceeding (Pet.Br. 12). This Court's analysis in *Carey* shows that petitioner's restrictive interpretation of the word proceeding is incorrect. In addition, Congress' instruction in the legislative history of Section 1988 to award attorney's fees when cases are resolved in prehearing settlements would be frustrated by such a restrictive interpretation of the word proceeding.

In *Carey,* this Court analyzed a proceeding under Title VII, which, like title VI, mandates conciliation efforts.[25] The Court concluded that the proceeding began

24. " . . . Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which noncompliance has been so found, or (2) by any other means authorized by law. *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No action shall become effective until thirty days have elapsed after the filing of such report." 42 U.S.C. 2000d-1.

25. Title VII provides: "If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. Section 2000e-5(b).

with procedures prior to the hearing stage, including conciliation efforts:

> *The first stage of the state administrative action is the investigation;* this results in either a finding of probable cause or a dismissal of the complaint. A finding of probable cause after investigation is a necessary prelude to the public hearing . . .
>
> Following the investigation, the Division attempts to conciliate the complainant's grievance with the employer . . . .
>
> If efforts at conciliation fail . . . a hearing is scheduled.

447 U.S. at 68-69 (citations omitted; emphasis supplied).

Petitioners' restrictive intrepretation of the word proceeding would frustrate Congress' instruction to encourage settlements by awarding attorney's fees in such cases, including cases settled prior to a hearing. Congress, in the committee reports stated:

> [F]or purposes of this award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief. S.Rep. at 5 (citations omitted).
>
> [A] prevailing party should not be penalized for seeking out-of-court settlement, thus helping to lessen docket congestion. Similarly, after a complaint is filed, a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as injunction is needed. H.R. Rep. at 7.

This Court also has on numerous occasions strongly endorsed the policy of encouraging settlements.[26] The em-

26. "Most important, [this interpretation of Title VII] serves as a potent force on behalf of Title VII's objective of

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phasis Congress placed on conciliation in Title VI and Title VII makes this policy of awarding fees in settlements particularly appropriate to administrative proceedings under these titles. In *Carey*, this Court concluded:

> It would be anomalous to award fees to the complainant who is unsuccessful or only partially successful in obtaining state or local remedies, but to deny an award to the complainant who is successful in fulfilling Congress' plan that federal policies be vindicated at the state or local level. 447 U.S. at 66.[27]

It would be equally anomalous to award fees to the complainant who is unsuccessful in obtaining relief through conciliation, but to deny an award to the complainant who is successful in fulfilling Congress' plan that civil rights violations be remedied through conciliation.[28]

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bringing discrimination to an end more quickly than is often possible through litigation." *EEOC v. Ford*, 458 U.S. 219 (1982) at 241; "In short, settlements rather than litigation will serve the interests of plaintiffs as well as defendants." *Evans v. Jeff D.*, 54 U.S.L.W. 4359 (U.S. April 21, 1986) at 4363 *quoting Marek v. Chesney*, 105 S.Ct. 3012 (1985), at 3018.

27. Petitioners' construction of the word proceeding would preclude complainants in EEOC proceedings against private employers from obtaining fee awards, for the proceeding ends after the conciliation stage without there ever being an adversary hearing. 29 C.F.R. part 1601. Similarly, the Maine Human Rights Commission, a certified designated EEOC Title VII state referral agency, does not provide for any administrative hearing. If conciliation fails, the proceeding ends and court action must be initiated. (Rule 2.09B, Maine Human Rights Commission Rules of Procedure.) Under petitioner's construction of "proceeding" Title VII complainants referred by the EEOC to the Maine agency would never be entitled to attorney's fees for administrative representation because there is never a hearing.

28. Amicus argues that recovery for administrative representation under the Equal Access to Justice Act, 5 U.S.C. 504, 28 U.S.C. 2412(d)(3) is limited to adversary proceedings and that allowing recovery for fees for prehearing administrative representation would be unprecedented (Am.Br. 22). First, the

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B. The Federal Administrative Proceeding In this Case Was One "To Enforce . . . Title VI."

Section 1988 requires that the proceeding in which respondents prevail be one "to enforce a provision of . . . title VI of the Civil Rights Act of 1964 . . . ." It is clear that respondents meet this requirement. The administrative proceeding in the instant case was specifically established to enforce Title VI. Title VI directed each federal department and agency to adopt regulations to enforce its provisions. 42 U.S.C. Section 2000d-1. The United States Department of Transportation set out its regulations at 49 C.F.R. Part 21, which is entitled "NONDISCRIMINATION IN FEDERALLY-ASSISTED PROGRAMS—EFFECTUATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964." Section 21.1 of Part 21 explains the purpose of that part:

> The purpose of this part is to effectuate the provisions of title VI of the Civil Rights Act of 1964 (hereinafter referred to as the Act) to the end that no person in the United States shall, on the grounds of race, color, or national origin, be excluded from

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Equal Access to Jusice Act uses specific narrow language which limits its application to adjudicatory hearings. "An agency that conducts an adversary adjudication shall award . . . ." 5 U.S.C. 504(a)(1). The use of this narrow language in the Equal Access to Justice Act as opposed to the broad language of Section 1988 —"any action or proceeding"—supports, rather than contradicts, the conclusion that Section 1988's scope is broader than that of the Equal Access to Justice Act. Second, awarding attorney's fees for prehearing representation is hardly unprecedented. This Court authorized recovery of fees including such representation in *Carey*. *See, supra* at 30-31. Also the regulations for Title VII administrative proceedings for federal employees specifically provide for an award of attorney's fees for settlements at any point in the proceedings, either before or after a hearing. 29 C.F.R. Sections 1613.217(a) and (c).

participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of Transportation.

Furthermore, the primary claim raised by respondents was petitioners' Title VI violation (J.A. 73-89).

C. Respondents Were A "Prevailing Party" In The Title VI Federal Administrative Proceeding.

The events in the Title VI federal administrative proceeding in this case show that respondents meet the Section 1988 requirement of being a "prevailing party". Respondents triggered the administrative proceeding with their complaint, which set out in detail the facts and law establishing the petitioners' Title VI violation (J.A. 62-96). The issues in the investigation were those raised by respondents' complaint.[29] After the agency made its probable cause determination, it urged the respondents to negotiate with the petitioners (J.A. 108). The respondents carried out these negotiations, advising the agency of their progress.[30] Finally, it was respondents who signed with petitioners the settlement document, which resolved the complaint and concluded the administrative proceeding. The agency itself was not a party to the settlement agreement (*Id*). Under the settlement agreement respondents obtained very substantial relief, the *quid pro quo* for which was the respondents giving up their legal right to pursue their Title VI claims (J.A. 108-130). In the instant case, respondents were accorded party status by both the agency

29. *See*, agency investigation plan (FIAR, 51-52).

30. *See*, letters from respondents' attorney to USDOT Office of Civil Rights (*Id*. 206-7, 212, 213-15).

and the petitioners.[31] Indeed, petitioners have never contested the fact that respondents were parties in the administrative proceeding. This is no oversight, rather it reflects the primary role which respondents performed in the proceeding.

Notwithstanding the above events, amicus, who did not participate in the administrative proceeding, argues that respondents do not meet the Section 1988 requirement of being a party. Significantly, the Court of Appeals below specifically concluded that respondents were prevailing parties (Pet. App. 8) and petitioners have not before this Court challenged that conclusion. Ordinarily this Court will not consider questions unless they are contested in both the courts below and presented in the petition for certiorari.[32] In this case respondents' status as parties in the administrative proceeding was not challenged in the courts below, in the petition for certiorari, or even in petitioners' brief on the merits. If this Court chooses to consider amicus' argument, it is clear that in this case respondents were not only a party, they were, with the agency's encouragement, the primary prosecuting party in the administrative proceeding.

Amicus bases its argument on the fact that complainants under Title VI have limited rights, that some Title VI regulations state that complainants are not parties to

31. Amicus cites *Arriola v. Harville*, 781 F.2d 506 (1986), which denied a fee claim under the Voting Rights Act, finding that the plaintiffs in that case were not parties to a preclearance review. Regardless of the correctness of that decision, it is inapplicable to this case for here the agency and petitioners did accord party status to respondents.

32. In addition, amici are not permitted to present questions not raised by petitioners. *United Parcel Service v. Mitchell*, 451 U.S. 56, 60 n.2 (1981). In rare exceptional circumstances, this Court has reviewed plain errors evident from the record. This case does not meet the strict standards required for such review. *Conner v. Finch*, 431 U.S. 407, 421 n.19 (1977).

the administrative hearings, and primarily on its characterization of Title VI administrative proceedings as being the agency pursuing the broad public interest rather than the rights of particular complainants (Am. Br. 14). Amicus asserts that these characteristics distinguish Title VI administrative proceedings from Title VII administrative proceedings. However, as the following comparison of Title VI and Title VII agency procedures shows the same characteristics amicus cites regarding Title VI proceedings apply to Title VII, in which complainants are, as this Court found in *Carey,* parties for purposes of recovering attorney's fees. Moreover, this comparison shows that the supposed fundamental difference which amicus sees in the nature of Title VI and Title VII administrative proceedings is illusory, for both are dual function proceedings with the agency pursuing the broad public interest as well as the particular interest of the complainant.

For example, amicus characterizes Title VI administrative proceedings as different from those under Title VII because individual complaints are just one means of agency enforcement and the agency retains control of the ensuing proceedings (Am. Br. 17). These statements are true regarding Title VI, but they are likewise true regarding Title VII. Under both the state Title VII regulations before this Court in *Carey* and the federal Title VII regulations, proceedings can be begun by the agency on the agency's own initiative and without an individual complaint (9 NYCRR 465.3(a) (3); 29 C.F.R. 1601.12). This is also typical of the other state Title VII agency procedures.[33] Moreover, even if the proceeding is begun by an

33. *See,* e.g., California-the agency may initiate proceeding on its own. Rule 7421(d), California Fair Employment and

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individual's complaint, the New York regulations before this Court in *Carey,* like those in a number of states, permit the agency to bring a complaint in its own name on the same facts even if the individual complaint is withdrawn (9 NYCRR 465.5(a)).[34] Also, New York regulations, like those of many states, give the agency the right to define the scope of the proceeding by *sua sponte* amending the complainant's complaint (9 NYCRR 465.4(b) and (c)).[35] After the proceeding is initiated, the agency under both Title VI and Title VII conducts an informal probable cause investigation, which is in the total control of the agency. If probable cause is found, both the Title VI and Title VII agencies attempt conciliation. The Title VII complainants' rights regarding conciliа-

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Housing Commission Rules of Procedure; *accord,* District of Columbia (D.C. Human Rights Act Sec. 1-2544(a); and Maryland (Maryland Fair Employment Practices Act Sec. 9(b)). *See* other comparable state procedures listed in *BNA Labor Relations Reporter, Vol. 8A Fair Employment Practices Manual.* All references to Title VII state administrative procedures in this brief are to procedures of agencies which have been certified and designated by the EEOC for referral of Title VII charges. 29 C.F.R. 1601.80.

34. *See,* e.g. California: "After submission of a case for decision, an accusation may be withdrawn, or settlement ordered, only with the approval of the Commission." Rule 7461, California (Fair Employment and Housing Commission Rules of Procedure); Iowa: "However, nothing herein shall preclude the commission from continuing the investigation and initiating a complaint on its own behalf against the original respondent, as provided for in the Act, whenever it deems it in the public interest." (Rule 1.3(2), Iowa Civil Rights Commission Rules of Procedure).

35. *See,* e.g. California: "At any time before the matter is submitted for decision, the Department may file and serve an amended or supplemental accusation on all parties and complainants." (Rule 7445(a), California Fair Employment Commission on Human Rights Rules of Procedure).

tion efforts are limited. For example the New York regulations before this Court in *Carey* specifically provide that the agency may enter into a conciliation agreement over the objection of a complainant and then terminate the entire proceeding (9 NYCRR 465.7(e)).[36] The New York regulations even give the agency the broad power to dismiss, prior to hearing and without review, any case for "administrative convenience", which includes the agency's determination that "processing the complaint will not advance the State's human rights goals." (9 NYCRR 465.5 (d)(2)(v)). Agency control is also apparent in the hearing procedures in the state Title VII regulations. Typically the agency, not the complainant, presents the case on behalf of the complaint and this is done through an agency attorney. In a number of states the complainant may not participate in the hearing unless the complainant moves and is allowed to intervene, and intervention is in the discretion of the agency.[37] And in Mary-

36. *See, e.g.* Connecticut: The commissioner enters into the conciliation agreement. "The complainant may apply to the chairman for reconsideration of the terms of such conciliation . . . . An application for reconsideration of the terms of the conciliation may be granted or denied at the discretion of the chairman" (Rule 31-125-16, Connecticut Commission on Human Rights and Opportunity Rules of Procedure); Minnesota: "The Commissioner and a respondent may at any time enter into an agreement or stipulation to conciliate, settle, or compromise the subject matter of a charge or a complaint." (Rule 5000.0800(3), Minnesota Department of Human Rights Rules of Procedure); and Maine: Commission may execute conciliation agreement even if complainant fails or refuses to agree to the terms. (Rule 2.08 (C), Maine Human Rights Commission Rules of Procedure).

37. California: " 'Party' includes the Department and any employees or agents of the Department acting in an official capacity, the respondent, and any person allowed to intervene in the proceeding." (Rule 7410(i), California Fair Employment and Housing Commission Rules of Procedure); Colorado: "At

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land, the regulations specifically provide that the complainant is not a party to the hearing, although the complainant is allowed to paticipate in the hearing.[38] Other state procedures follow the pattern of the Title VI regulations in this case, setting out the rights of the agency and the respondent without specifying the rights of the complainant.[39] Finally, after any evidentiary hearing many state Title VII agencies lack enforcement power, as does EEOC, and it is completely within the discretion of the agency whether to seek relief in court on behalf of the complainant. In contrast, under the Title VI regulations in the instant case, while the agency had discretion in the means of obtaining compliance, the regulations required the agency to obtain compliance and Section 603 of Title

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the discretion of the hearing officer, complainant shall be permitted to intervene either in person or by counsel to present oral testimony or other evidence and to examine and cross-examine witnesses." (Rule 10.8(A)(2), Colorado Rights Commission Rules of Procedure); Massachusetts: "In the discretion of the commission, the complainant may be allowed to intervene and present testimony in person or by counsel." (Mass. Ann. Laws ch. 151B, § 5 (Michie/Law Co-op 1986)). Missouri: "At the discretion of the hearing panel or hearing examiner, the complainant may be allowed in person or by counsel, to intervene and present testimony and cross-examine witnesses." (Rule 4 CSR 180-2.030, Missouri Commission on Human Rights Rules of Procedure); and New Hampshire:: "In the discretion of the commission, the complainant may be allowed to intervene and present testimony in person or by counsel." (N.H. Rev. Stat. Ann. ch. 354-A:9 (1984)).

38. "As used in Regulation .07 [procedures regarding the evidentiary hearing on the complaint] the word 'party' means the Maryland Commission on Human Relations or the respondent." (Rule .01(G), Maryland Commission on Human Relations Rules and Procedures). These rules do allow the complainant to participate in the hearing and specifically make the complainant a party to procedures reviewing, on the record, the decision of the hearing officer (*Id.*).

39. *E.g.* Connecticut Commission on Human Rights and Opportunities Rules of Procedure.

IV provides the complainant with a right to review of the agency action.[40]

Thus, from the above it can be seen that while Title VI agency enforcement is concerned with the broader public interest and this is reflected in the agency procedures, so too is Title VII agency enforcement. And while a Title VI complainant's administrative procedural rights may be limited, so too are those of most Title VII complainants. And both perform an important role in the administrative process and are "parties" under their respective attorney's fees provisions.[41]

D. Awarding Attorney's Fees In This Case Furthers The Congressional Goal Of Section 1988 Of Assisting The Enforcement Of Civil Rights And It Encourages The Settlement Of Civil Rights Disputes.

Congress in enacting Section 1988 sought to further enforcement of our civil rights. There are manifest good

40. Amicus points out that Congress anticipated that complainants would have a role in the Title VII agency enforcement efforts. It is clear that Congress likewise anticipated that individuals would file complaints with the agencies under Title VI. Several members of Congress unsuccessfully objected to such involvement by individuals. Regarding the Title VI judicial review provision of Section 603 they stated: "It should also be remembered that this judicial procedure is available to those who bring charges of discrimination and who are aggrieved by the negative ruling of the administrative agency." (Comments of Hon. Richard H. Poff and Hon. William Cramer, *reprinted in*, 1964 U.S. Code Cong. & Ad. News 2470).

41. Amicus' contention that complainants cannot be parties in administrative proceedings for purposes of Section 1988 fee awards would produce a result that fails to carry out the goal of Congress in enacting Section 1988. If complainants are ineligible for fees, then only respondents would be eligible for fees (assuming they met the standard for prevailing defendants), since Section 1988 excepts the United States from recovering fee awards. While Congress was not hostile to defendants' recovering fees in limited situations, providing fees for defendants was certainly not the main goal of Section 1988. *See*, S. Rep. 5.

reasons for Congress to have concluded that informed and active participation by administrative complainants, which requires participation by counsel, improves Title VI enforcement. Complainants come to these proceedings in the best position to know the factual bases for their complaints and with by far the greatest incentive to pursue Title VI grievances vigorously. Agencies themselves have conceded that they do not have sufficient resources to process Title VI complaints without such assistance: "HEW has candidly admitted its inexperience and inadequate staffing in this area (Title VI administrative reviews of hospital relocations)." *NAACP v. Wilmington Medical Center*, 599 F.2d 1247, 1249 (3rd Cir. 1979); *see also Cannon v. University of Chicago*, 441 U.S. 677 (1979): "HEW has candidly admitted that it does not have the resources necessary to enforce Title IX in a number of circumstances." 441 U.S. at 708 n.42.

Perhaps most important, attorneys for complainant enhance the prospect that the case will be resolved by conciliation.[42] By its nature conciliation requires participation by the private party aggrieved, for often the process will require substantial settlement negotiations with complainants, as occurred between respondents and petitioners in this case. In addition, complainants are more likely to join in a conciliation agreement if their own counsel has participated in the events leading up to the

42. Conciliation, as well as other mechanisms for negotiation and less formal dispute resolution, are valuable tools in an agency's kit of procedures, because such mechanisms reduce costs compared to more formal procedures, lower court filings to the extent that they are successful, and may reach stable and satisfactory resolution more often than formal adjudication. These and related virtues have been widely noted. See Burger, "Isn't There A Better Way?" 68 *ABA J.* 274; *see also*, cases cited *supra* at 31-32 n.26.

settlement and in the drafting of the settlement document. In this case complainants agreed to the relocation of their entire community. Such agreement would have been unlikely if complainants had not been secure that their rights were fully protected by their own counsel. Finally, the chances for settlement are further increased because the prospect of having to pay conmplainant's attorney's fees enhances the probability that defending parties will earnestly explore settlement at early stages.[43] See, *Evans v. Jeff D., supra.*

On the other hand, if this Court rules that persons like respondents and proceedings like the conciliation efforts here do not come within the ambit of Section 1988, such persons will have a strong incentive to avoid participation in such efforts and to seek avenues of redress that do hold out the prospect of attorney's fees, for otherwise they may have to forego representation entirely. Accordingly, agencies will be less able to employ expeditious procedures such as conciliation, mediation and negotiation because parties essential to those efforts, the persons aggrieved will be forced to pursue their claims in federal courts, where they can recover a complete remedy, which includes attorney's fees.

Amicus argues that awarding fees for administrative representation will disrupt agency proceedings, since it will encourage complainants' participation, and the agency and the complainant may have divergent interests. This

43. Respondents note that in Carey and in this case, in which the defending parties did not believe they were liable for complainants attorney's fees in the administrative proceeding, the proceedings took more than three and four years, respectively, to be resolved. Respondents suggest no bad faith in these proceedings, but adding liability for attorney's fees into the defending parties' calculus of settlement decision making would likely bring many of the proceedings to an earlier resolution.

argument is both wrong and, since Congress has made a contrary judgment, beside the point. As shown by the procedural limitations on complainants' rights in Title VII regulations, including those before this court in *Carey,* agencies can easily control the course of the proceedings, notwithstanding the presence of complainant's counsel and the ability of complainants to recover attorney's fees. Regarding the possible divergent interests of the agency and the complainant, this fact supports rather than negates,[44] the need for complainants' own counsel, as this court found in *Carey:*

> It is thus obvious that the assistance provided a complainant by the Division attorney is not fully adequate, and that the attorney has no obligation to the complainant as client. In fact, at times the position of the Division may be detrimental to the interests of the complainant and to enforcement of federal rights. Representation by a private attorney thus assures development of a complete factual record at the investigative stage and at the administrative hearing. At both, settlement is possible and is encouraged. A Division employee cannot act as the complainant's attorney for purposes of advising him whether to accept a settlement. Retention of private counsel will help assure that federal rights are not compromised in the conciliation process. 447 U.S. at 70.[45]

44. In fact amicus made this argument to this Court in *Carey:* "Sections 706(f)(i) of Title VII and 297(4)(a) of the New York Human Rights Act, N. Y. Exec. Law (McKinney 1972-1978 Supp.), both reflect legislative understanding that public agencies vindicating vital public interests may not adequately represent the individual, because the interest of the government and the narrower interest of the individual often diverge."
Brief for the United States and the Equal Employment Opportunity Commission As Amicus Curiae, at 20.

45. The need for attorneys for complainants is particularly great given the primary function that amicus assigns to Title VI

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If attorneys are to be available to complainants, it is essential that attorney's fees be recoverable for administrative representation. As Congress recognized in enacting Section 1988, many of the victims of racial discrimination are poor and unable to retain attorneys: "In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer." S. Rep. 3.[46] Also, as was the situation in this case, frequently the relief obtained will not include recovery of money from which a fee could be paid. In enacting Section 1988 Congress explicitly considered this factor, which is embodied in the concept of the private attorney general: "When a plaintiff brings an action under [Title II] he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general', vindicating a policy that Congress considered of the highest priority." *Id.* quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), at 402.

Still, Amicus asserts that fees awards will produce incentives for complainants to delay or disrupt the agency enforcement effort or will result in a reduction of the

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administrative proceedings. They assert that administrative proceedings are "central" to Title VI enforcement and "if requested by the federal government, a court should normally stay a private Title VI enforcement action pending completion of federal administrative effort . . ." (Am. Br. 28). Amicus' position that victims of discrimination should be denied the means to secure attorneys and effectively participate in these proceedings is particularly incongruous with these proceedings serving as the primary forum for Title VI enforcement.

46. For example, more than one third of blacks in the country live in poverty. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1986 series P-60 nos. 147 and 149*, at 457 (1986).

amount of substantive relief offered to take into account the attorney's fees liability (Am. Br. 27). The short answer, again, is that Congress has made a contrary judgment. Amicus' claims apply to any and all situations in which attorney's fees are recoverable. Congress' enactment of Section 1988 demonstrates that in its judgment the benefits of providing access to attorneys for victims of civil rights discrimination far outweighs these possibilities. "Fee awards are an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these [civil rights] laws contain . . . ." S. Rep. 3. Moreover, there are adequate safeguards to prevent any of the problems amicus raises. Meeting the requirements of Section 1988 is only the threshold step in recovering attorney's fees. The district court must still, as it did in this case, approve the amount of the fees. The court's wide discretion in determining the amount of the fees and the opposing parties' interest in limiting the fee award provide ample protection to prevent any of the possible problems suggested by amicus.

In summary, affirming the judgment of the Court of Appeals granting attorney's fees in this case will assist the enforcement of civil rights by making it possible for the person aggrieved by the civil rights violation to participate in the administrative enforcement proceeding through counsel. Affirming this judgment also increases the chances that these civil rights disputes will be resolved through settlements.

II. ATTORNEY'S FEES FOR ADMINISTRATIVE REPRESENTATION MAY BE RECOVERED IN AN INDEPENDENT ACTION.

Since agencies which adjudicate Title VII complaints do not have authority to award attorney's fees, successful complainants must, as Section 1988 directs,[47] apply to the court for such an award. For the complainant who is successful in the administrative proceeding, and does not need to bring a federal court action on the merits, this application must be via an independent court action solely for the purpose of recovering fees. In *Carey*, this Court authorized such an independent action under Title VII:

> We agree with the District Court that the availability of a federal fee award for work done in state proceedings following EEOC referral and deferral should not depend upon whether the complainant ultimately finds it necessary to sue in federal court to obtain relief other than attorney's fees. But our agreement with the District Court compels us to reject its conclusion. It would be anomalous to award fees to the complainant who is unsuccessful in fulfilling Congress' plan that federal policies be vindicated at the state or local level. Since it is clear that Congress intended to authorize fee awards for work done in administrative proceedings, we must conclude that Section 706(f)(1)'s authorization of a civil suit in federal court encompasses a suit solely to obtain an award of attorney's fees for legal work done in state and local proceedings. 447 U.S. at 65-66.

The same anomalous consequences this Court rejected in *Carey* would occur under Section 1988 if fees for administrative representation depended upon whether by happenstance circumstances required the complainant to file a court action on the civil rights claim itself.

Petitioners' contend that the case of *Moor v. County of Alameda,* 411 U.S. 693 (1973)[48] supports their argument that no independent action can be brought to recover administrative attorney's fees. The cases cited by petitioner with *dicta* stating this argument also claim support in *Moor.*[49] However, a review of *Moor* shows that it dealt with an entirely different situation and *Moor* does not in fact support petitioners' argument. In *Moor,* the plaintiff attempted to bring a claim against a county for damages due to the actions of a deputy sheriff. At the time the claim was brought counties were immune from damage suits under 42 U.S.C. Section 1983 because they were not considered to be persons under Section 1983.[50] The *Moor* plaintiff tried to circumvent this limitation by attempting to base his claim on Section 1988, which in the

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47. Section 1988 provides that "the court may award . . ." fees (emphasis added).

48. Petitioners state that this issue is "subsumed" in the issue of whether fees are recoverable for administrative representation (other than administrative representation compensated due to its assisting related litigation) (Pet. Br. 23). However, petitioners then cite cases which stated in *dicta* that a successful administrative complainant could not bring an independent court action, even if the fees were otherwise recoverable.

49. Petitioners cite *Derheim v. Bur. of Soc. Ser.,* 524 F. Supp. 1321 (D. Minn. 1981), *aff'd on other grounds,* 688 F.2d 66 (8th Cir. 1982), *Estes v. Tuscaloosa County,* 696 F.2d 898 (11th Cir. 1983), and *Horacek v. Thone,* 710 F.2d 496 (8th Cir. 1983). These cases may be distinguished on the basis that the administrative proceedings in those cases were proceedings which were not concerned with enforcement of one of the provisions listed in Section 1988 and thus the fee claim did not meet the requirements of Section 1988.

50. This municipal immunity was subsequently removed by this Court's decision in *Monell v. New York City Dept. of Social Services,* 431 U.S. 658 (1976).

portion not dealing with attorney's fees instructs federal courts to use state law to supplement federal laws in determining damages for violations of federal civil rights, where such state remedies are not inconsistent with federal law. 411 U.S. at 703. The *Moor* plaintiff argued that since California law provided an action against municipalities, Section 1988 could be used to transform this state cause of action into a federal cause of action. It was this attempted use of Section 1988, to avoid the then existing immunity of municipalities, which this Court rejected in *Moor*.[51] And it was in this context that this Court stated that Section 1988 was "intended to complement the various acts which do create federal causes of action for the violation of federal civil rights." 411 U.S. at 702. In contrast to the plaintiff in *Moor*, respondents in this case do not seek to use Section 1988 to circumvent Section 1983 or any other federal law. Instead, they seek only the full remedies provided by Congress for violation of Title VI, remedies for which they did not previously have the opportunity to petition, since the administrative agency did not have the authority to award attorney's fees.[52]

Even if a court action is required to entitle a successful administrative complainant to attorney's fees, in this case such an action did occur in the *ECOS* case. During the negotiation of the settlement of the administrative complaint, petitioners submitted the final EIS for the

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51. The Court pointed out that incorporating this state cause of action would conflict with federal law, namely Section 1983, which then excluded municipalities.

52. That *Moor* does not address the issue of the availability of an independent court action for recovery of attorney's fees is further seen in the fact that at the time *Moor* was decided Section 1988 did not even contain an attorney's fee provision, which was enacted subsequently in 1976.

freeway to the federal court and moved to have dissolved the existing injunction, which prohibited construction of the freeway until the federal court approved the final EIS. At this point the administrative complaint had not been settled and respondents had no legally enforceable agreement with the petitioners regarding the freeway or the treatment of respondents' community.[53] Respondents therefore moved to intervene in the *ECOS* action, attaching to their motion a complaint raising their Title VI claims. Respondents and petitioners subsequently settled the administrative complaint by executing the final mitigation plan and they contemporaneously executed a consent judgment dismissing the *ECOS* action. Although the district court did not specifically rule on the motion to intervene, respondents were made parties to the action by their signing the consent judgment, which dismissed with prejudice their Title VI and other claims. Therefore, even if a court action is required to enable a successful complainant to recover attorney's fees for administrative representation, respondents participated in such an action and this requirement does not bar their claim for fees.[54]

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53. Functionally respondents were in the same position as the plaintiff in *Carey*. They were seeking to resolve the case administratively but had to file a court action to protect their interests in the event the case was not resolved administratively.

54. Finally, if this Court should conclude that attorney's fees are not recoverable for federal Title VI administrative proceedings, respondents are still entitled to recover fees for the portion of time spent on the administrative complaint which was useful and necessary to the federal court action. *Webb*, 105 S.Ct. at 1929. Given petitioners' concession that the substantial relief achieved by respondents was due to the administrative complaint and the fact that the identical issues were raised in both the administrative complaint and the court action, respondents would be entitled to recover fees for much of the

(Continued on following page)

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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By: MICHAEL D. CALHOUN

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By: ALICE A. RATLIFF

June 1986

(Continued from previous page)

time spent in the administrative proceeding and the case should be remanded for determination of this amount. In this case such hours would, at minimum, include the legal and factual research conducted, consultations with assisting experts and time spent regarding negotiations with the petitioners.

RESPONDENTS' APPENDIX

A. N. C. Department of Transportation Memorandum Re Meeting With Respondents ..... App. 1

B. Letter From Respondents' Attorney to Barry L. Del-Castilho and William F. Caddell ..... App. 4

C. N. C. Department of Transportation File Notes June 14, 1982 to September 7, 1982 ..... App. 6

(SEAL)
STATE OF NORTH CAROLINA
DEPARTMENT OF TRANSPORTATION
RALEIGH 27611

JAMES B. HUNT, JR.
GOVERNOR

WILLIAM R. ROBERSON, JR.
SECRETARY

DIVISION OF HIGHWAYS

FILE: Durham, East-West Freeway

SUBJECT: Meeting to Discuss Clarification of Mitigation Plan and Mechanism for Finalizing the Plan

A meeting was held on March 29, 1982 at the Durham City Hall. Attending were: Cecil Brown and Linda Del Castilho, representing the City of Durham; Bob Scott, representing the FHWA; Alice Ratliff and Mike Calhoun, representing the Crest St. neighborhood; and Bill Caddell, Louis Allen, Don Lambe, Jim Meade and Richard Smith representing the NCDOH. The purpose of the meeting was to discuss the proposed clarification changes to the mitigation plan and the mechanism for finalizing the plan.

The meeting was began by discussing the proposed changes in the mitigation plan. Linda passed out copies of the mitigation plan that had incorporated the changes requested by NCDOH at the meeting held 3-18-82. A copy of that plan is attached. After reviewing several individual changes, Mike expressed concern that the changes were

being made. He stated the mitigation plan had already been approved by the Crest St. Community Council and the Durham City Council and he saw no need to start making changes in that document. Everyone agreed that the final mitigation plan would contain clarification and details not contained in the presently approved plan; therefore, this "converted" mitigation plan could possibly be used as guidance in completing the final plan, but should not take the place of the presently approved plan. It was further agreed that the NCDOH would submit in writing their concerns and proposed clarification of the approved plan to the Crest St. representatives for their review and ultimate concurrence.

The next item discussed was regarding the proposal to send NCDOH representatives into the Community to inform the residents of the benefits relating to the mitigation plan. Louis Allen passed out draft copies of a "handout" which would be used in explaining the various benefits to the residents. After much discussion, the Crest St. representatives said they felt the information should be more specific and NCDOH should be in a position to tell each resident secifically (sic) what his or her options were. NCDOH specified information until more detailed information were available. At that point in the discussion NCDOH representatives said they understood that Crest St. had asked that the information be provided to the residents so that the neighborhood could give final approval to the mitigation plan prior to the preparation of the final EIS. Mike said it would be satisfactory to Crest St. to complete the EIS based on the mitigation plan that was approved by the city council. The state would have to agree not to present the EIS to the Court until the details of the plan

had been worked out & the residents had been informed of their specific options and approved the plan. Bill Caddell said he saw no problems with handling the plan in that manner. It was, therefore, agreed that the city would immediately conduct a survey of houses within the community that could be rehabilitated. It was felt this was necessary before the mitigation plan could be detailed enough for the EIS. Also, the information contained in the "Hartman Survey" would be obtained by the Crest St. representative from Carol Stack and provided to NCDOH. This would permit a relocation study report to be prepared which would be adequate for the EIS.

The NCDOH representatives asked the Crest St. representatives if they had any objections to the location survey crews being allowed to begin surveying within the neighborhood. They said they would not object to the crews starting their surveys April 5. They said they would inform the community of that start.

NCDOH representatives asked what boundaries should be shown in the EIS for the Crest St. neighborhood. It was agreed that the boundaries should be the same as those of the mitigation plan unless there is objection from the Crest St. Community. They (Crest St.) will let the NCDOH know their decision by April 2.

Subsequent to this meeting, Richard Smith met with Joe Creech and informed him the surveys could begin April 5. Joe was provided a list of names and addresses of the leaders of the Crest St. Community Council and their lawyers. He was also briefed as to the delicacy of the entire situation so that his staff could be told.

RFS/jc

NORTH CENTRAL LEGAL ASSISTANCE PROGRAM

June 11, 1982

Mr. Barry L. Del Castilho
City Manager
City of Durham
101 City Hall Plaza
Durham, North Carolina 27701

Mr. William F. Caddell, Jr.
Assistant State Highway Administrator
North Carolina Department of Transportation
Raleigh, North Carolina 27611

Dear Barry and Bill:

This letter is to confirm the agreement reached among the Crest Street Community, the City of Durham and the North Carolina Department of Transportation. This agreement was previously set out in my letter to the North Carolina Department of Transportation, dated April 20, 1982. However, the time table and procedures set out on page 2 of that letter were subsequently modified at our meeting on May 6. At that meeting it was agreed that it would not be necessary to prepare prior to the submission of the environmental impact statement a document setting forth more details of the mitigation plan. It was agreed instead that agreement on several basic issues would be reached and reduced to writing prior to submission of the environmental impact statement to the state planning board on May 17 and a final site plan and a document setting out the details of the mitigation plan will be prepared and agreed upon by the parties prior to submission of the environmental impact statement to the federal court. We met again on May 12 and at that time reached agreement on the general terms for the "soft second mortgage", the procedures for relocatable and rehabitable structures, the relo-

cation of the existing community store and the time table for implementation of the mitigation plan. I received from each of you letters confirming agreement on these general terms.

Main Office:

106 West Parrish St.
Post Office Box 2101
Durham, NC 27702
919-688-6396

Please let me know if there are any omissions or errors in the above summary of our agreement. I suggest that we meet together again soon to discuss the procedure and time table for preparations of the final site plan.

Sincerely,

Michael D. Calhoun
Staff Attorney

MDC/wmg

cc: Robert Scott
Linda Del Castilho
Richard Smith

N.C. DEPARTMENT OF TRANSPORTATION

FILE NOTES

JUNE 14, 1982 TO SEPTEMBER 7, 1982

June 14—Received letter from Crest St. Attorney confirming agreement reached on the mitigation plan and acknowledging letters of confirmation on agreement from City and NCDOH.

July 6—Met with representatives of City, Crest St. and FHWA. Purpose was to discuss remaining items that needed to be accomplished prior to implementation of the mitigation plan. It was determined that: 1-group meetings and individual meetings needed to be held with Crest St. residents, 2—the mitigation plan and municipal agreement needed to be finalized and approved by the City Council and Board of transportation and 3—the court injunction must be lifted.

July 12—Met with representatives of City, Crest St. and FHWA. Purpose was to discuss proposed meetings with Crest St. residents. Agreement was reached on a proposed handout that would be distributed at the meetings. City asked that DOT secretary write letter supporting the Section 202 Application. This was done on July 19.

July 15—A meeting was held with residents of the Crest St. Community. Purpose was to discuss the various benefits that would be available to them with the mitigation plan and permit them to schedule an appointment with personnel of NCDOH for individual interviews.

July 20—Met again with Crest St. residents for same purpose as July 15 meeting.

July 23—FEIS was approved and signed by FHWA Regional Administrator.

Aug. 4—FEIS transmitted to EPA.

Aug. 20—FEIS appeared in Federal Register.

Aug. 23—Met with representatives of City, Crest St. and FHWA. Purpose was to discuss results of individual meetings with Crest St. residents. The only problem encountered was the demand for one bedroom housing that is not being provided by the Section 8 housing. Also the status of the Section 202 housing was still uncertain.

Aug. 27—Met with representatives of City, Crest St., and FHWA. Purpose was to discuss ways to finalize site plan and resolve any other problems.

Sept. 7—Met with representatives of City, Crest St. & FHWA. Purpose was to discuss final site plan and problem of insufficient number of one bedroom units. It was determined that the one bedroom problem could be solved by use of the Section 8 Moderate Rehab. program of which the city already has 50 units targeted for the Crest St. neighborhood.

Supreme Court, U.S.
FILED
SEP 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-767

In The
Supreme Court of the United States
October Term, 1986

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, ET AL,

Petitioners,

vs.

CREST STREET COMMUNITY COUNCIL, INC., ET AL

Respondents.

ON WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

REPLY BRIEF FOR PETITIONERS

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REPLY ARGUMENT

I. Respondents first argue (Resp. Br. 15-27) that the reference to "proceeding" in "action or proceeding" in Section 1988 suggests congressional intent to allow an award of attorney's fees for administrative proceedings.

A. We do not disagree with the general proposition that the term "proceeding" may include an administrative proceeding. Plainly, that is the case. *New York Gaslight Club, Inc. v. Carey,* 447 U.S. 54 (1980) However, the mere *inclusion* of the term "proceeding" in Section 1988 does not prove conclusive congressional intent to provide attorney's fees for time spent in all administrative proceedings anymore than the *exclusion* of that term would conclusively establish congressional intent to disallow such awards. See *Pennsylvania v. Delaware Valley Citizen's Council for Clean Air,* — U.S. —, 106 S.Ct. 3088, 3095, — L.Ed.2d — (1986). If that were so, *Carey* could have been decided without resort to examination of its enforcement scheme and legislative history. Respondents' entitlement to attorney's fees under Section 1988 does not turn on the broad inquiry whether attorney's fees are *ever* available under Section 1988 for time spent in an administrative proceedings. The correct and necessary inquiry in this case is whether the nature of the activities engaged in by respondents' counsel—participating in meetings and informal negotiations and communicating with NCDOT *et al,* to resolve alleged violations of Title VI[1]—is an activity which Congress

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[1]See FEIS pp. 18-21 for a brief description of these activities. The respondents' statement of Hours and Expenses characterizes

(Continued on following page)

considered to be appropriate for an award of attorney's fees. The language of Section 1988, particularly the mere inclusion of the term "proceeding," is insufficient to establish congressional intent to mandate such an award.

B. Respondents' contention (Resp. Br. 18-23) that the legislative history supports their reading of Section 1988 fails.

1. First, congressional rejection of the Senator Helm's amendment to delete "proceeding" from Section 1988 sheds no light on the meaning of the term, including its relevance to Title VI administrative enforcement. In particular, there is no suggestion that members of Congress intended, by their action, to extend the scope of Section 1988 to include participation in Title VI voluntary conciliation efforts such as those requested by the federal agency in this case.

2. Second, the House Report's reference to *Parker v. Matthew,* 411 F.Supp. 1059 (D.D.C. 1976), relied upon by respondents (see Resp. Br. 18-19), was limited to the Report's assertion, not at issue in this case, that "if the litigation terminates by consent decree, it would be proper to

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(Continued from previous page)

the activities as "meetings," "monitoring," "conferences," not trials or hearings. Appendix, *infra,* pages 10-52. The activities are comparable to the public involvement Action Plan process under 23 U.S.C. § 109(h) and although less formal, to the public hearings under 23 U.S.C. § 128. See *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 415 (1971).

award counsel fees" (H. Rep. 1558, 94th Cong. 2d Sess., 7 (1964); there is no need for "a full evidentiary hearing before a judge or jury" (*ibid.*). The Report is no manner refers with "approval" (Resp. Br. 19) to that distinct portion of the opinion concerned with an award of fees for time spent in administrative proceedings. Furthermore, the administrative proceedings at issue in *Parker* were Title VII proceedings, not Title VI informal conciliation efforts and all agree that fee awards are appropriate under Title VII's distinct administrative enforcement scheme.

3. Third, respondents erroneously rely (Resp. Br. 19-20) on the fact that when Section 1988 was enacted, some courts had held that private rights of action under Title VI required prior exhaustion of administrative remedies. As the legislative history of Section 1988 makes plain, in enacting Section 1988 Congress deliberately chose not to address the issue whether a private right of action even existed at all under Title VI. See, *e.g.,* 122 Cong. Rec. 35116 (1964) (remarks of Rep. Railsback). Having refused to address that fundamental threshold issue, one can hardly attribute to that same Congress a view concerning the secondary question of the need for exhaustion of Title VI administrative remedies.

Indeed, as pointed out by the brief of the United States as *amicus curiae* (Br. 18-19), congressional debate concerning the significance of Section 1988 to Title VI reveals that Congress assumed that Section 1988 would apply to Title

VI only in the event that the courts ultimately concluded that an implied private right of action to sue in court existed under Title VI[2]. This legislative assumption is flatly inconsistent with respondents' position, which if adopted would require congressional intent to apply Section 1988 to Title VI administrative proceedings, regardless of the outcome in the courts of the implied private right of action controversy.

Respondents make an attempt to dispute (Resp. Br. 20-22) the plain import of the legislative history by arguing that Congress could not have made the assumption suggested by the United States because regardless of the availability of implied private right of actions, complainants would have been entitled to fees through judicial review of agency action under Section 603 of Title VI, 42 U.S.C. 2000d-2. Respondents' premise is fundamentally flawed, however, because the availability of private complainant challenges under Section 603 to federal agency action is far from clear. The literal language of the provision contemplates challenges brought only by those persons aggrieved by decisions "terminating or refusing to grant or to continue financial assistance" (42 U.S.C. 2000d-2) and not actions brought by persons aggrieved by agency decisions not to make such funding cut-off determi-

[2]It's assumption turned out to be correct. *Cannon University of Chicago,* 441 U.S. 677 (1979); *Guardians Association v. Civil Serv. Commission, N.Y.C.,* 463 U.S. 582 (1983).

nations. Indeed, as this Court has noted, it was in order to provide victims of discrimination with a remedy that certain legislators supported the creation of a private right of action. See *Cannon v. University of Chicago,* 441 U.S. 677, 716 n.52 (1979), quoting 110 Cong. Rec. 5256 (remarks of Sen. Keating) ("Under section 603, a state * * * which is denied funds because discrimination is taking place, is given the right of action in court. But there is no correlative right of action in the citizen. If funds are granted to discriminatory projects by public officials, the citizen who is denied the benefits of the project has no correlative right to bring a suit in court, and he should have."). And, as this Court further stressed in *Cannon,* congressional rejection of an express private right of action in Title VI was designed not to deny the possibility of an implied private right of action against the federal recipient but as a legislative "compromise aimed at protecting individual rights without subjecting the [Federal] Government to suits" (442 U.S. at 715 (footnote omitted)).[3]

II. Respondents' argument (Resp. Br. 27-32) that the activities they engaged in constituted "proceedings" within

[3]Respondents' sole support for the contrary view is an isolated statement in an appendix to a House Report that was signed only by two legislators who, in making it, were offering arguments why the legislation should *not* be enacted (See Resp. Br. 40 n.40)—such a slender and unreliable indicator of congressional intent is entitled to no weight particularly when, as here, the plain meaning of the statute and remarks by the bill's supporters refute its content.

the meaning of Section 1988 reveals the boundlessness of their claim for fees in this case.

A. To be sure, an individual claimant who ultimately settles his Title VI claim may still be entitled to an attorney's fee award, but only if the settlement was pursuant to the claimants' status as a formal party to an action or proceeding to enforce Title VI in which the claimant has prevailed. Hence, there can be no doubt that if respondents had maintained a lawsuit in court under their implied private right of action to enforce Title VI against petitioners and favorably settled their discrimination claims prior to a full evidentiary hearing, Section 1988 might entitle them to an award of attorney's fees for their efforts. On the other hand, if, as what actually occurred, they had favorably settled their implied right of action under Title VI without resort to maintaining an action or proceedings against petitioners, they would not.

B. Respondents, however, ignore the essential threshold requirement that they must be a "party" to a "proceeding" to enforce Title VI and, as a consequence, offer a view of Title VI under which, in effect, any investigations or discussions conducted by a person who claims to be a victim of discrimination by a recipient of federal funds would constitute a "proceeding" to enforce Title VI within the meaning of Section 1988. Respondents would, in effect, equate the term "proceeding" with any effort taken by a victim of discrimination, as long as there was assistance of counsel, to assert the victim's civil rights. The term

"proceeding" would, therefore, be deprived of any meaningful legal significance. One should not ascribe to Congress such an expansive and boundless view of the propriety of attorney's fee awards under Section 1988, at least as applied to Title VI.

C. Instead, as suggested by the United States in its *amicus* submission (U.S. Br. 14-18, 21-22, see also *id.* at 24-26) the better view of Title VI administrative enforcement is that it is exclusively the province of the federal agency as enforcer. The private citizen may, as in this case, become involved by bringing a potential violation to the attention of a federal agency and by participating in informal settlement discussions instigated by the federal agency pursuant to Title VI's explicit demand for voluntary conciliation efforts, but those negotiations do not amount to "proceedings" to which the complainant may be denominated a prevailing party and consequently recover attorney fees from the recipient.[4]

D. Indeed, as respondents have themselves stressed in their brief (Resp. Br. 1, 34), the formal role of the federal agency, even in those negotiations it requests may seem fairly minimal. The absence of substantial formal federal agency involvement does not, however, suggest that the ensuing negotiations constitute private enforcement proceedings or that the federal agency or the federal recipient have accorded the

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[4]Query: if the recipient had "prevailed," what would the respondents say as to their liability for the attorney fees of the recipient under Section 1988?, not "parties?" not "an action or proceeding?"

complainant party status. To the contrary, it underscores that the negotiations are not a federal proceeding to which there are any formal parties at all, anymore than if respondents had initiated the negotiations themselves. Instead the negotiations simply represent one product of the federal agency's effort to harmonize the purposes of the legislative enactment funding the recipient's activities with the nondiscrimination mandate of Title VI.

III. Respondents claim (Resp. Br. 35) that this Court should not consider whether respondents were parties to the administrative proceeding because the issue was neither raised nor ruled on by the parties below. This claim is refuted by the record and, in addition, misapprehends the import of this Court's practice of not entertaining, as a prudential matter, issues raised in the Court in the first instance.[5]

A. First, the district court decision leaves no doubt that the significance of respondents' lack of status as parties to the administrative proceeding was raised and ruled on by the courts below. See Pet. App. 37. The trial court specifically based its decision that respondents were not entitled to fees, in part, on their limited role in the administrative enforcement setting.

B. Second, the argument that respondents are not a party, within the meaning of Section 1988, is not, in

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[5]Petitioners do not dispute that respondents were "parties" to the Final Mitigation Plan agreement or that they were participants in the informal resolution process which resulted in the agreement. Petitioners dispute that respondents were parties in an action or proceeding to enforce Title VI within the meaning of Section 1988 which resulted in the agreement.

any event, the type of "new" issue that this Court has typically chosen not to entertain. The "party" issue is merely the other side of the same coin as the issue whether respondents participated in a "proceeding" to enforce Title VI, within the meaning of that provision. Hence, the alternative characterization of the issue serves only to highlight existing issues and not to inject wholly new legal questions into the dispute.

IV. Respondents' reliance (Resp. Br. 35-40) on certain similarities between Title VI and Title VII administrative enforcement to support their view that attorney's fees awards for participation in administrative enforcement is mistaken. Although the two administrative enforcement schemes share certain features, they nonetheless remain fundamentally different in both nature and design. Their differences, moreover, support the application of varying legal standards for the awarding of attorney's fees.

A. The federal administrative enforcement scheme under Title VII may have as a competing purpose the promotion of the public interest generally, but the administrative framework is, by congressional design, a fundamental, indeed mandatory, aspect of private enforcement as well. Not only is the federal agency specifically empowered to safeguard the interests of the individual, but the individual must himself exhaust the administrative remedy and seek administrative relief for his discrimination claim, prior to bringing lawsuit. The individual complainant is, therefore, a party to the administrative enforcement proceeding under federal law from the moment

that the administrative complaint is filed. Hence, all the activities subsequently undertaken by the complainant subsequent to the filing, including any required deferral to state administrative proceedings (regardless of how the specific state law may denominate the complainants' role (see Resp. Br. 38-39)) or informal conciliation efforts, are activities the complainant takes in his capacity as a party under federal law to the federally-mandated proceedings.

B. Under Title VI, in contrast, filing an administrative complaint does not render the individual complainant a party to the administrative proceeding because, notwithstanding some common features, the nature and purpose of that proceeding is fundamentally different *vis* a *vis* the rights of the individual.

1. While the administrative process is a fundamental aspect of the federal agency's enforcement scheme, it is deliberately not, as it is in Title VII, simultaneously an integral part of the private enforcement scheme; for this reason, it is not even a prerequisite to filing suit for an implied private Title VI claim like it is for Title VII.

2. The reason for this distinction between Titles VI and VII stem from the special "consensual" nature of Title VI's nondiscrimination mandate which, unlike that of Title VII, is rooted in the congressional spending power and depends for its accomplishment on the acceptance of federal funds by certain public and private entities. *Guardians Association v. Civil Serv. Commission of N.Y.C.*, 463 U.S. 582 (1983).

3. Because of its consensual, indeed contractural nature, the federal agency enforcing Title VI is, in certain respects, acting in privity with the recipient of federal funds and, consequently, must be concerned both with Title VI's nondiscrimination mandate and with those legislative purposes dependent upon the activities of the federal recipient. Title VI administrative enforcement, unlike Title VII enforcement, often depends for its successful accomplishment, therefore, on a federal agency striking that delicate balance needed to further both the purposes of the federal legislation funding the federal recipient's activities and Title VI's nondiscrimination mandate.

4. The main thrust of agency enforcement of Title VI provided by Congress is obtaining from the recipient compliance with the Title VI standards prescribed by the agency, and as to which it has expertise in relationship to the assistance program it is charged to administer. Providing individual complainants with party status for their participation in federal efforts to promote informal conciliation and voluntary settlement is fundamentally incompatible with the nature of that federal enforcement function and would, contrary to congressional design, have the effect of converting the federal agency enforcement scheme into (as all agree it is for Title VII) a basic component of private enforcement.

a. Entitlement to attorney's fees for the complainant would inevitably establish a different relationship between the complainant and

federal re ient, by, for instance, enhancing the advers ial nature of their dealings,

b. Application of Section 1988 would also tend to displace the federal agency as the preeminent enforcement authority, replacing an exclusive sphere of federal agency enforcement with an additional mechanism for private enforcement,

c. Indeed, respondents suggest just such a displacement of the federal agency enforcement function in claiming (see Resp. Br. 41) that it is the individual complainants, not the federal agency, who can best enforce Title VI. What respondents ignore is that this Court found an implied private right of action to enforce Title VI in court not just in recognition of the special abilities and needs of private enforcers, but also in response to the substantial need to maintain the independent administrative enforcement function of administrative agencies. The practical effect of respondents' expansive reading of private administrative enforcement of Title VI would be, however, to convert the federal agency enforcement mechanism into the very avenue for private enforcement that this Court assumed Title VI to lack.

C. Respondents are mistaken in their assertion (Resp. Br. 40-45) that petitioners' view will deny respondents the right to secure attorneys, in contravention of the

congressional goal to assist victims of discrimination, and that any problems in disruption of agency enforcement can be adjusted in determining the appropriate amount of fees.

1. Most fundamentally, respondents' argument simply proves too much. All agree, as they must, that Congress intended to provide attorney's fee awards to prevailing victims of discrimination. The only issue in this case is whether Congress intended to place some limitations on either the capacity or the forum in which the victim must be asserting its rights. Under respondents' view, the prevailing victim must be entitled to fees in all circumstances because a contrary view would fail to promote completely the bringing of civil rights claims. Whatever the wisdom of that approach as a matter of policy, we do not believe that the statutory language of Section 1988 established that Congress adopted such a open-ended approach. Instead, in our view, the mere possibility that providing complainants with additional fees might provide additional incentive for private enforcement does not provide a sufficient basis for ignoring the congressional determination to maintain an independent federal agency administrative enforcement scheme. Certainly nothing in Section 1988 suggests such a drastic reworking of Title VI.

2. In addition, it is the characterization of the complainant's formal role in the Title VI administrative enforcement setting, not the precise amount of fees awarded in a given case, that is at odds with the congressional design for Title VI administrative enforcement.

V. Attorney's fees are not recoverable in an independent court action. In *Carey*, the plaintiff, while her mandatory state proceedings to enforce Title VII were ongoing, filed an action in federal court to enforce her Title VII rights and to recover attorney fees under the attorney fees provisions of Title VII. She obtained complete Title VII relief in the state proceedings on the merits, rendering her claim on the merits in federal court moot, but she did not recover attorney fees in the state proceedings. Therefore, in order to obtain the complete relief for a Title VII violation envisioned by Congress in the enforcement scheme provided, she was entitled to recover attorney fees, either in federal court or in the mandated state proceedings. Clearly if the state procedure did not provide complete Title VII relief, she was entitled to obtain the deficit in federal court. Such is not the enforcement scheme for Title VI. Participation by private parties in assisting informal activities to help a federal assistance agency obtain from a recipient voluntary compliance with Title VI requirements (the opportunity for which is required by the Title VI enforcement proceedings) is not an integral part of the private enforcement remedy for Title VI envisioned by Congress, so that when the private citizen fails to recover attorney fees for such participation he has not failed to obtain the complete relief envisioned by Congress in the enforcement scheme for Title VI. The language of Section 1988 itself, when read in the light of the Title VI enforcement provisions, and the legislative history of both acts negates establishment of any such separate private right of action.

VI. Respondents wrongly suggest that petitioners violated an agreement and committed a breach of trust when it filed a motion in the *ECOS* case to dissolve the existing injunction. (Resp. Br. Footnote 8 and Resp. Br. Appendix). There was an agreement that the *ECOS* injunction would not be dissolved until final agreement on the mitigation plan was reached. The motion was filed merely for lead time to provide for service upon the scattered plaintiffs and to put the case in a position to be calendared and heard, if respondents were unable to persuade the *ECOS* plaintiffs not to oppose the motion. Respondents did not object at the time the motion was filed or ask that it be withdrawn. Regardless, the suggestion is irrelevant because the district court found that the respondents' representation as applicants for intervention in the *ECOS* action had no causal connection or acted even as a catalyst to the Final Mitigation Plan agreement.

CONCLUSION

For the foregoing reasons and those set forth in their original brief, petitioners respectfully request that this Court reverse the decision of the Fourth Circuit Court of Appeals in this case and affirm the decision of the District Court.

Respectfully submitted, this the 29 day of September, 1986.

LACY H. THORNBURG
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No. 85-767

In the Supreme Court of the United States

OCTOBER TERM, 1985

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, ET AL., PETITIONERS

v.

CREST STREET COMMUNITY COUNCIL, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether local community organizations are entitled to recover their attorney's fees under 42 U.S.C. 1988, based on their having brought an alleged violation of Title VI of the Civil Rights of 1964, 42 U.S.C. 2000d *et seq.*, to the attention of the appropriate federal agency, and their having participated in informal negotiations sponsored by the federal agency that resulted in a favorable settlement agreement.

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INTEREST OF THE UNITED STATES

Federal agencies have the primary enforcement responsibility under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, for ensuring that any program or activity receiving federal financial assistance does not unlawfully discriminate on the basis of race, color, or national origin. Accordingly, federal agencies have promulgated implementing regulations setting forth Title VI investigation and enforcement procedures. As this Court has frequently noted, the Department of Justice played a central role both in the drafting of Title VI and in the development of the various agencies' implementing regulations. See, *e.g.*, *Alexander* v. *Choate*, No. 83-727 (Jan. 9,

1985), slip op. 7 n.11; *Guardians Ass'n* v. *Civil Service Comm'n*, 463 U.S. 582, 592 (1983) (opinion of White, J.); see also Exec. Order No. 12,250, 3 C.F.R. 298 (1980) (Department of Justice responsible for approving and coordinating federal agency Title VI programs). The issue in this case, whether attorney's fees are available under 42 U.S.C. 1988 for time spent participating in agency enforcement proceedings, requires consideration of the nature of Title VI administrative proceedings and the relationship of the federal agency enforcement process to private Title VI enforcement. If attorney's fees are made available, the enforcement scheme Congress created will be altered in a manner that threatens to interfere with federal agencies' administrative enforcement responsibilities.[1]

STATEMENT

This case concerns whether a person who complains to a federal agency that a recipient of federal funds is engaging in discrimination in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, may recover attorney's fees under 42 U.S.C. 1988 for time spent in informal negotiations sponsored by the federal government to resolve those allegations. Respondents are several local civic and

[1] The federal interest in this case extends to federal agency enforcement of both Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. (Supp. V 1975) 794, both of which were generally patterned after Title VI (see *Cannon* v. *University of Chicago*, 441 U.S. 677, 684-685 (1979) (Tit. IX); *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 626, 632-633 n.13 (1984) (§ 504)). The attorney's fee provision of 42 U.S.C. 1988 applies to Title IX and the attorney's fee provision of the Rehabilitation Act, 29 U.S.C. 794a, uses language similar to that contained in Section 1988.

church organizations representing the interests of residents of a stable, cohesive, predominately black, neighborhood (Crest Street) in Durham, North Carolina (Pet. App. 2). They complained to the United States Department of Transportation (USDOT) that petitioners, two state transportation agencies and the state official in charge of both agencies, had violated Title VI. The merits of the dispute were entirely resolved through USDOT's informal conciliation efforts (*id.* at 22-25). Respondents then filed this lawsuit for the sole purpose of recovering attorney's fees for time spent participating in the agency's negotiation process. The district court dismissed the complaint for failure to state a claim, but the Fourth Circuit reversed (*id.* at 1-21, 22-40).

1. In September 1978, two of the respondents submitted a "complaint" with USDOT alleging, inter alia, that petitioners' proposed highway extension project would violate various federal environmental, transportation, and civil rights laws, including the National Environmental Policy Act, 42 U.S.C. 4331 *et seq.*, the Federal-Aid Highway Act, 23 U.S.C. 109(h), and Titles VI and VIII of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, 3601 *et seq.* (Pet. App. 23 & n.1; J.A. 73-96). Respondents sought to prohibit further planning or construction of the highway project by petitioners until the project was brought into compliance with these federal laws (Pet. App. 24). Respondents' Title VI claim was based on the allegation that the highway extension project was receiving federal financial assistance and that its proposed location would, by destroying the Crest Street neighborhood, displace a disproportionately large number of blacks (J.A. 80-81, 86).

2. Having received "information indicat[ing] a possible failure to comply with [Title VI]" USDOT initiated an investigation of petitioners' "practices and policies" (see 49 C.F.R. 21.11(c)) (Pet. App. 24). In February 1980, USDOT informed petitioners that its investigation had resulted in a preliminary finding of reasonable cause to believe that the proposed highway extension would be a prima facie violation of Title VI and USDOT's implementing regulations (Pet. App. 3, 24; J.A. 97-99).[2] Accordingly, USDOT pursued "informal means" (see 49 C.F.R. 21.11(d)(1)) of resolving petitioners' apparent noncompliance by initiating informal negotiations with petitioners (Pet. App. 4, 24). Representatives of the Federal Highway Administration, the City of Durham, and opponents of the highway, including respondents, participated in these negotiations (*ibid.*). By February 1982, respondents and petitioners had reached a preliminary agreement on freeway design, relocation assistance benefits, and other assistance to mitigate the project's adverse impact, and were continuing to negotiate on remaining aspects of alleged discrimination (*id.* at 4, 25).

In August 1982, with negotiations ongoing, petitioners moved to dissolve a 1973 judicial decree that

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[2] The letter from USDOT referred specifically to 49 C.F.R. 21.5(b)(3), which provides:

> In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding persons from, denying them the benefits of, or subjecting them to discrimination under any program to which this regulation applies, on the grounds of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this part.

had enjoined the proposed highway extension based on noncompliance with various federal environmental and transportation laws, unrelated to Title VI (Pet. App. 5, 25). On October 15, 1982, respondents moved to intervene in that pending judicial action, alleging violation of federal environmental, transportation, uniform relocation assistance, and civil rights laws, including Title VI (*ibid.*; J.A. 100-102). On December 14, 1982, without ever having acted on respondents' intervention motion, the district court entered a consent judgment dissolving the injunction and dismissing the original lawsuit upon which the injunction was based (Pet. App. 5-6; J.A. 153-157). The consent judgment also announced that on November 19, 1982, respondents and petitioners had reached agreement on those matters remaining in controversy and, accordingly, respondents did not oppose dissolution of the injunction, yet "reserve[d] their claim for attorney[']s fees against [petitioners]" (Pet. App. 6 n.6; J.A. 155). Respondents signed the consent judgment in their capacity as applicants for intervention (J.A. 156). Petitioners and respondents and the City of Durham executed a Final Mitigation Plan, which provided respondents with substantial relief, in a public ceremony the day after the court order (Pet. App. 6; J.A. 108-130).

3. On November 30, 1983, respondents filed this action against petitioners for recovery of attorney's fees based on 42 U.S.C. 1988 (Pet. App. 27; J.A. 3-52). Respondents claimed they were "prevailing part[ies]" within the meaning of that statutory provision and, accordingly, entitled to recovery of attorney's fees (J.A. 8-9). The fee request covered five years and eight months—from the date re-

spondents first hired legal counsel to the date of the announcement of the Final Mitigation Plan—and totaled 1,261.25 hours of attorney time, all but 37 hours of which was time spent prior to the motion to intervene, and over half of which occurred prior to initiation of the USDOT informal conciliation process (Pet. App. 30; J.A. 10-52).

The district court granted petitioners' motion to dismiss for failure to state a claim and for judgment on the pleadings (Pet. App. 22-40). The court held that Section 1988 does not authorize an award of attorney's fees for work performed in Title VI federal agency administrative proceedings (Pet. App. 35-36). The court distinguished on several grounds this Court's ruling in *New York Gaslight Club, Inc* v. *Carey*, 447 U.S. 54 (1980), that identical language relating to attorney's fees for private enforcement of Title VII (see 42 U.S.C. 2000e-5(k)) did include work performed in Title VII state administrative proceedings (Pet. App. 33-34). In particular, the district court noted that for Title VI, unlike Title VII, exhaustion of administrative remedies is not required prior to filing a private lawsuit, those remedies "not [being] integral parts of [respondents'] federal court remedy" (*id.* at 34, 35).[3] According to the district court, "administrative proceedings under Title VI * * * seem particularly unsuited for an award of fees because individuals, beyond filing an administrative complaint, have little input or control into the decisional process" (*ibid.*); the complainant "is not a mandatory party to the USDOT investigation nor to any action or in-

[3] The court rejected (Pet. App. 36-37) respondents' contention that it was reasonable for them to believe in September 1978 (the date respondents filed their administrative complaint) that exhaustion of administrative remedies was necessary.

action taken with respect to the recipient of federal funds" (*id.* at 37). Finally, the court concluded (*id.* at 38) that respondents were not entitled to attorney's fees for the small portion of time allocated to the effort to intervene in the pending district court lawsuit. Specifically, the court found that "there [was] no evidence that the * * * effort[] * * * significantly contributed to the execution of * * * [or] was even a catalyst to the Plan" (*id.* at 39).

4. The court of appeals reversed (Pet. App. 1-21). At the outset, the court noted that petitioners "concede that [respondents] gained substantial relief that was causally related to their administrative complaint and that [respondents] therefore are 'prevailing parties'" (*id.* at 8). The court went on to hold (*id.* at 8-13) that the word "proceeding" in Section 1988 embraced "administrative proceeding," relying on *New York Gaslight Club, Inc.* v. *Carey*, *supra*, and that the USDOT proceeding initiated by respondents' complaint was a "proceeding to enforce" Title VI, within the meaning of Section 1988. The court of appeals reasoned, moreover, that federal administrative proceedings under Title VI could be "analogized to * * * mandatory [administrative] procedures" because "[t]hey are the primary and perhaps the only remedy for violation of * * * [T]itle [VI]" (Pet. App. 13).

The court rejected petitioners' contention that *Webb* v. *County Bd. of Educ.*, No. 83-1360 (Apr. 17, 1985), supported denial of respondents' claim for attorney's fees. In *Webb*, this Court held that a party who had prevailed in his 42 U.S.C. 1983 lawsuit was not entitled to recovery of attorney's fees for time spent in state administrative proceedings pursuing state law claims that related to the same incident. The court of appeals concluded that *Webb*

stood for the proposition that administrative proceedings could be the proper subject of a Section 1988 attorney's fees claim so long as the procedures were "important parts of the statutory enforcement scheme[,]" which, the court held, Title VI federal administrative procedures were (Pet. App. 18). Finally, the court of appeals concluded that Section 1988 authorized an independent action to recover attorney's fees for time spent in an administrative proceeding, but that "[e]ven i[f] some type of court action were required to trigger § 1988's fee provision, [respondents] would still have a claim to fees by virtue of their proposed complaint and motion to intervene in the [pending district court] action" (*id.* at 20).

SUMMARY OF ARGUMENT

The court of appeals' decision below, awarding respondents attorney's fees under Section 1988 for time spent in Title VI administrative proceedings, misapplies 42 U.S.C. 1988 and rests on a misconception of the role of private parties, such as respondents, in Title VI administrative proceedings. Section 1988 provides that "[i]n any action or proceeding to enforce a provision of" certain civil rights laws, including Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, the court may award the "prevailing party" attorney's fees as part of the party's costs. Title VI prohibits any discrimination on the basis of race, color, or national origin in any program or activity receiving federal financial assistance (42 U.S.C. 2000d) and, to that end, confers upon federal agencies dispensing federal financial assistance the primary responsibility for enforcing that mandate. Specifically, Title VI authorizes each agency to terminate or refuse to grant financial assistance, or to pursue other authorized means of achieving Title VI compliance, upon an express finding (on the record) of a Title VI violation, provided that the agency first determines that Title VI "compliance cannot be secured by voluntary means" (42 U.S.C. 2000d-1).

An individual or group may, as respondents did here, set in motion a federal agency investigation and compliance review by notifying the agency of an alleged Title VI violation, but the private complainant is not a formal "party" to those agency efforts, as required by Section 1988, nor are the agency's efforts to secure voluntary means of compliance "proceeding[s]" to enforce Title VI, within the meaning of Section 1988. By express congressional design, Title VI's administrative enforcement scheme relies on internal federal agency proceedings, within which the agency, as investigator and enforcer, possesses wide discretion to devote investigation resources, promote conciliation efforts, devise remedial schemes, and make funding termination determinations.

Nor is there any basis for supposing that Congress had a different understanding of the nature of Title VI administrative proceedings when Congress enacted Section 1988. The legislative history surrounding enactment of Section 1988 reveals that Congress intended that Section 1988 would apply only to private Title VI enforcement actions brought in court; there is no suggestion that Section 1988 would apply to Title VI administrative proceedings, especially informal agency-sponsored negotiations, which are not even within the embrace of an attorney's fee provision, such as the Equal Access to Justice Act, 5 U.S.C. 504, 28 U.S.C. 2412(d), that specifically al-

lows awards for time spent in administrative proceedings.

Section 1988 applies, in all events, only to an administrative proceeding that is an "integral" component of private enforcement of federal civil rights law (see *Webb* v. *County Bd. of Educ.*, No. 83-1360 (Apr. 17, 1985), slip op. 6), and Title VI administrative proceedings do not fit this description. Indeed, a major consideration leading to this Court's endorsement, with our support, of an implied private right of action to enforce Title VI in court, was the absence of a private administrative enforcement mechanism in Title VI. The practical effect of respondents' (and the court of appeals') expansive reading of private enforcement of Title VI would be, however, to convert the federal agency enforcement mechanism into the very avenue for private enforcement that this Court had assumed Title VI to lack. Congress enacted Title VI pursuant to its power under the Spending Clause and, consequently, the force of the Title VI nondiscrimination mandate depends on a potential grantee of federal financial assistance accepting the funds, including the conditions attached to their receipt. It is no doubt largely for this reason that Congress instructed federal agencies to enforce Title VI primarily through securing "voluntary" compliance. Respondents' view of the role of private enforcement in administrative proceedings takes no account of these significant congressional concerns and threatens to undercut the effectiveness of Title VI.

Finally, any argument that our view of private enforcement of Title VI will promote the premature filing of private lawsuits is without merit. The availability of a private right of action to sue a recipient of federal financial assistance in court is always limited by the federal agency's right to use its administrative process to resolve the controversy either on its own or, should the agency prefer, with the assistance of both the complainant and the recipient. Consequently, a preemptive filing of a lawsuit by a complainant would not entitle the complainant to an award of attorney's fees in the event (as in this case) that the federal agency efforts led to a favorable resolution. Otherwise, private causes of action to enforce Title VI, implied by the judiciary, could usurp the federal agency enforcement mechanism of Title VI, expressly created by Congress. We can not suppose that Congress intended such a result in enacting either Title VI itself or the attorney's fee provision of Section 1988.

ARGUMENT

SECTION 1988 DOES NOT AUTHORIZE AN AWARD OF ATTORNEY'S FEES TO COMPLAINANTS IN TITLE VI ADMINISTRATIVE PROCEEDINGS WHEN THEIR ROLE IS CONFINED TO NOTIFICATION OF THE APPROPRIATE FEDERAL AGENCY OF A VIOLATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 AND TO PARTICIPATION IN INFORMAL AGENCY-SPONSORED NEGOTIATIONS THAT RESULT IN A FAVORABLE SETTLEMENT AGREEMENT

The decision of the court of appeals below, reversing the district court's dismissal of respondents' claim for attorney's fees, fundamentally misconceives the federal agency administrative enforcement scheme of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, expressly created by Congress for the investigation and resolution of allegations of Title VI violations. The statutory language of Title VI, its legislative history, and decisions of this Court re-

flect the settled view that the administrative enforcement process created by Congress is exclusively a *federal agency* enforcement mechanism, in which private parties, such as respondents, have no statutorily defined investigatory or enforcement role, and may participate only at the invitation of the appropriate federal agency. Congress deliberately chose to provide federal agencies with wide discretion in investigating and remedying Title VI violations, largely in response to the special nature of requirements, such as those in Title VI, that depend on the recipient's continued acceptance of federal funding.

The court of appeals incorrectly assumed, however, that Congress created the administrative enforcement framework to provide for *private* enforcement of Title VI. Under the court of appeals' reading of Title VI, private individuals or groups, such as respondents, have formal "party" status in internal federal agency enforcement and remedial efforts and are entitled to an award of attorney's fees for "prevailing" based on their participation in agency efforts to resolve Title VI disputes. In this case, the agency "proceeding[s]" in which respondents participated were a series of informal negotiations sponsored by USDOT to promote, pursuant to explicit statutory command (see 42 U.S.C. 2000d-1), "voluntary means" of Title VI compliance. We believe that the court of appeals' construction of Title VI is at odds with congressional intent and would undermine the ability of federal agencies to investigate allegations of Title VI violations and, if found, to remedy the problem, particularly through voluntary means, as required by the statute. Certainly, nothing in Section 1988 supports such a dramatic reworking of federal agency enforcement of Title VI. For this

reason, we support reversal of the decision of the court of appeals below and agree with petitioners that respondents' claim for attorney's fees should be dismissed.

A. Title VI Administrative Complainants Are Not "Part[ies]" To A "Proceeding" To Enforce Title VI Within The Meaning Of Section 1988

Respondents base their claim for attorney's fees on 42 U.S.C. 1988, which provides that "[i]n any action or proceeding to enforce a provision of" certain civil rights laws, including Title VI, the court may award the "prevailing party" attorney's fees as part of the party's costs. Although we have no quarrel with the notion that respondents' cause "prevailed," in the sense that the Final Mitigation Plan extends substantial relief to those interests represented by respondents, we do not believe that respondents meet the remainder of Section 1988's requirements. Respondents participated in the informal negotiations sponsored by USDOT, but without the formal "party" status required by Section 1988. And those informal negotiations were, in all events, not "proceeding[s] to enforce * * * Title VI" within the meaning of Section 1988.[4]

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[4] Examination of the record suggests that petitioners' apparent concession below, noted by the court of appeals (Pet. App. 8), that respondents were "prevailing parties" was directed to respondents' "prevailing" status, and not to their status as formal "parties." As described by the court of appeals, petitioners admitted only that respondents "gained substantial relief that was causally related to their administrative complaint" (*ibid.*). We do not read this "concession" as disturbing the separate argument, relied on in part by the district court (*id.* at 37), that respondents did not possess formal "party" status in the informal negotiations sponsored by USDOT.

The structure of Title VI makes clear that federal agency enforcement proceedings are meant to focus primarily on assuring the funding recipient's compliance with Title VI rather than on providing individualized relief to victims of discrimination. Title VI contemplates that the federal agency will function in a classic law enforcement capacity, representing the public interest rather than enforcing the rights of particular complainants. The statute defines the funding recipient's rights and the funding agency's enforcement tools, but it does not define any role in the investigation or enforcement process for a person who complains of the recipient's conduct.

In Title VI, Congress conferred upon those federal agencies dispensing federal financial assistance the primary responsibility for ensuring that programs or activities supported do not discriminate on the basis of race, color, or national origin (42 U.S.C. 2000d-1). Title VI authorizes each agency to terminate or refuse to grant assistance to a recipient of federal financial assistance, or to pursue other authorized means to achieve Title VI compliance, upon an express finding on the record, after opportunity for hearing, of a Title VI violation (*ibid.*). Termination of or refusal to grant assistance is limited both to the particular recipient (including any part thereof) found to be in noncompliance, and to the particular program in which noncompliance is found. The statute provides, moreover, that the agency may not take remedial action until after advising the recipient of the failure to comply and after determining that "compliance cannot be secured by voluntary means" (*ibid.*).

Reflecting this express statutory mandate, the various federal agencies, with the advice and approval of

the Department of Justice (see Exec. Order No. 12,250, 3 C.F.R. 298 (1980)), have promulgated Title VI implementing regulations that establish an administrative procedural framework for using complaints as a tool in Title VI enforcement rather than considering complaint resolution as an end in itself. Typically, the regulations outline an enforcement scheme that relies on pre-commitment compliance reviews, periodic compliance reports, and compliance investigations (in the event that subsequently acquired information suggests the possibility of a violation).[5] Although USDOT regulations, like those of most federal agencies, provide that the Secretary will investigate upon receiving any "information indicat[ing] a possible failure to comply with [Title VI]" (49 C.F.R. 21.11 (c)), complaint by a person who claims to be a victim of unlawful discrimination is only one possible source of such information (49 C.F.R. 21.11(b)). To effect compliance, the agency must first use "informal" or "voluntary" compliance efforts before resort to a formal adjudicatory hearing that could

[5] See generally ACTION, 45 C.F.R. Pt. 1203; Department of Agriculture, 7 C.F.R. Pt. 15; Department of Commerce, 15 C.F.R. Pt. 8; Department of Defense, 32 C.F.R. Pt. 300; Department of Education, 34 C.F.R. Pt. 100; General Services Administration, 41 C.F.R. Pt. 101-6.2; Department of Health and Human Services, 45 C.F.R. Pt. 80; Department of Housing and Urban Development, 24 C.F.R. Pt. 1; Department of the Interior, 43 C.F.R. Pt. 17; Department of Justice, 28 C.F.R. Pt. 42 Subpt. C; Department of Labor, 29 C.F.R. Pt. 31; Small Business Administration, 13 C.F.R. Pt. 112; Department of State, 22 C.F.R. Pt. 141; Department of Transportation, 49 C.F.R. Pt. 21; Veterans Administration, 38 C.F.R. Pt. 18. The first Title VI regulations were published on December 4, 1964. See 29 Fed. Reg. 16273-16309.

lead to a funding cut-off (49 C.F.R. 21.13).[6] In those circumstances when evidence of discrimination has been supplied by a person who claims to be a victim, the regulations provide only that the complainant should be advised of the results of USDOT's investigation (49 C.F.R. 21.11(d)(2)). Even when formal administrative hearings are held, the complainant is only advised of the time and place of the hearings (49 C.F.R. 21.15(a)). The complainant plays no formal role in *any* of the administrative proceedings (49 C.F.R. 21.11, 21.13, 21.15, 21.17). Indeed, the regulations of many federal agencies explicitly provide that a complainant is not a "party" to any agency proceedings resulting from his complaint.[7]

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[6] See also 7 C.F.R. 15.8(c) (Department of Agriculture); 15 C.F.R. 8.11(a) (Department of Commerce); 34 C.F.R. 100.7(d) (Department of Education); 45 C.F.R. 80.7(d) (Department of Health and Human Services).

[7] Those agencies that have formally promulgated detailed Title VI procedural regulations expressly declare the nonparty status of the complainant. See, *e.g.*, 34 C.F.R. 101.23 (Department of Education) ("A person submitting a complaint pursuant to [the Department's complaint procedure] is not a party to the proceedings governed by [these regulations], but may petition, after proceedings are initiated, to become an amicus curiae."); 7 C.F.R. 15.66 (Department of Agriculture) ("person submitting a complaint * * * is not a party"); 24 C.F.R. 2.23 (Department of Housing and Urban Development) (same); 38 C.F.R. 18b.18 (Veterans Administration) (same); 45 C.F.R. 81.23 (Department of Health and Human Services) (same). The USDOT Title VI regulations, which do not include such detailed procedural regulations, do not explicitly declare the nonparty status of the complainant, but the import of the regulations is clear, given that the complainant is provided with no formal role in any of the proceedings. The nonparty status of a complainant is also confirmed by the lenient standards established by the USDOT regulations for defining who can be a complainant. Under USDOT regulations, a person does not have to allege that he has been subjected to unlawful discrimination, or even that he represents others who have been. (49 C.F.R. 21.11(b)). To be a complainant, it is enough to allege that "any specific class of persons [is] be[ing] subjected to discrimination * * *" (*ibid.*).

Thus, consistent with the deliberate congressional statutory design, the administrative framework for ensuring compliance with the Title VI nondiscrimination mandate is primarily a mechanism for the federal agency to ensure compliance with Title VI, rather than an avenue for private enforcement. The submission of a complaint by private entities, such as respondents in this case, provides only one of several means of triggering initiation of the federal agency administrative compliance review and enforcement process. The proceedings that result remain under the exclusive control of the federal agency, within which the government, as investigator and enforcer, possesses wide discretion to devote investigation resources, promote conciliation efforts, devise remedial schemes, and make fund-termination determinations. As described by this Court in *Cannon* v. *University of Chicago*, 441 U.S. 677, 707 n.41 (1979) (citations omitted), in the context of Title IX (which was patterned after Title VI):

> [The statute] confers a benefit on a class of persons * * * [but does not] assure those persons the ability to activate and participate in the administrative process contemplated by the statute. * * * [T]he complaint procedure adopted by [the federal agency implementing regulations] does not allow the complainant to participate in the investigation or subsequent enforcement proceedings. Moreover, even if those proceedings result in a finding of a violation, a resulting

> voluntary compliance agreement need not include relief for the complainant. Furthermore, the agency may simply decide not to investigate —a decision that often will be based on a lack of enforcement resources, rather than on any conclusion on the merits of the complaint.

The decision of the court of appeals below, by assuming complainants had formal "party" status, misapprehended the true nature of the proceedings and, as a result, misapplied Section 1988.

2. Examination of the legislative history surrounding the enactment of Section 1988 further confirms the view that Congress did not intend to apply Section 1988 to Title VI administrative proceedings. During the 1976 debates on Section 1988 on the floor of the House of Representatives, several members questioned the significance of the reference in Section 1988 to Title VI, on the ground that it was not clear that Title VI provided for a private right of action. See 122 Cong. Rec. 35116 (1976) (remarks of Rep. Quie); see also *ibid.* (remarks of Rep. Bauman). Rather than suggest that Section 1988 would apply to "prevailing complainants" who participated in the federal administrative process provided by Title VI (then reflected in the implementing regulations of the various federal agencies), a major proponent of the bill simply replied: "This bill merely creates a remedy in the event the courts determine that an individual may sue under these statutes" (*id.* at 35124) (remarks of Rep. Railsback); see also *id.* at 35116 (same). No Member of Congress suggested, or appears to have seriously contemplated, that Section 1988 would apply to Title VI apart from any judicially created private right of action to enforce Title VI *in courts*. Respondents, however, do not base

their Section 1988 claim for attorney's fees on such a judicially created private right of action to enforce Title VI in court. Their novel claim is based instead on participation in federally sponsored informal negotiations, available under the statute totally apart from any private enforcement rights implied by this Court subsequent to the enactment of Section 1988.

3. Contrary to respondents' view (Br. in Opp. 9-13), neither *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54 (1980), construing a virtually identical attorney's fee provision applicable to Title VII (42 U.S.C. 2000e-5(k)), nor *Webb* v. *County Bd. of Educ.*, No. 83-1360 (Apr. 17, 1985), construing Section 1988 in the context of a claim for attorney's fees based on a successful action brought under Section 1983, supports respondents' cause. Indeed, these two decisions are better read as supporting no fee award in the circumstances of this case. Most fundamentally, although *Carey* certainly stands for the proposition that the term "proceeding" in an attorney's fee provision *may* include an administrative proceeding, *Webb* makes clear that under Section 1988 a person is not automatically entitled to an attorney's fees award for participation in *any* administrative proceeding related to that person's civil rights claim.[8] Instead, a court entertaining a Sec-

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[8] The meaning of the term "proceeding" is not, of course, generally confined to administrative proceedings and refers more typically to types of judicial proceedings. See, *e.g.*, 28 U.S.C. 1251 (original and exclusive jurisdiction lies in this Court for "actions or proceedings" involving ambassadors and other foreign officials and for "actions or proceedings by a State against citizens of another State or against aliens"); see also 28 U.S.C. 132, 143, 151, 1358, 1692, 1915, 1921, 2462. For that reason, the inclusion of the term "proceeding" in an attorney's fee provision does not, by itself, compel the conclusion that Congress intended to extend awards to all admin-

tion 1988 claim must consider the nature of the administrative proceeding, particularly whether the proceeding is an "integral" component of the private enforcement scheme (*Webb*, slip op. 6). As explained in *Webb* (*id.* at 5-7), the prevailing litigants in *Carey* were entitled to attorney's fees for time spent in administrative proceedings only because those proceedings were an essential, indeed mandatory, part of private enforcement of the relevant statutory scheme (Title VII). In contrast, the prevailing litigant was not entitled to attorney's fees for time spent in the administrative proceedings in *Webb* because they were "not any part of the proceedings to enforce § 1983" (*id.* 6-7).

A similar comparison of the nature of the administrative "proceedings" at issue in this case to those in *Carey* compels, as in *Webb*, the conclusion that Section 1988 does not authorize an award of attorney's fees to respondents. Here, unlike in *Carey* (447 U.S. at 65; see 42 U.S.C. 2000e-5(f)) and as in *Webb*

istrative proceedings. For instance, 28 U.S.C. 1875(d)(2), which provides for attorney's fees awards to an employee who prevails in his claim that an employer unlawfully discriminated against the employee based on his service on a jury, refers to "any action or proceeding," even though the statute nowhere contemplates any administrative proceedings. In *Carey*, moreover, the Court looked not just to the word "proceeding," but more broadly to the legislative history and structure of Title VII before concluding that administrative proceedings were covered by the relevant attorney's fee provision (see 447 U.S. at 62-64). In contrast, as this Court noted in *Webb* (slip op. 7 n.16), there are "numerous references in [Section 1988's] legislative history to promoting the enforcement of the civil rights statutes 'in suits,' 'through the courts' and by 'judicial process'" (quoting S. Rep. 94-1011, 94th Cong., 2d Sess. 2, 6 (1976); H.R. Rep. 94-1558, 94th Cong., 2d Sess. 1 (1976)).

(slip op. 6), respondents were not required to participate in the administrative proceedings for which they now claim entitlement to attorney's fees. See, *e.g.*, *Chowdhury* v. *Reading Hospital & Medical Center*, 677 F.2d 317, 322 (3d Cir. 1982) ("exhaustion of the agency funding termination procedures * * * [is not] a prerequisite to a private action"), cert. denied, 463 U.S. 1229 (1983).[9] Even more importantly, however, the relationship of the federal administrative proceedings to the interest of the individual complainant is fundamentally different in Titles VI and VII. The federal (and related state) administrative proceedings under Title VII, unlike Title VI, are statutorily designed to resolve the *individual complainant's* claim of discrimination; the Equal Employment Opportunity Commission (EEOC), for instance, is empowered to bring civil suits on the individual's behalf, seeking reinstatement, back pay, and injunctive relief (see 42 U.S.C. 2000e-5(g)). Title VII, moreover, specifically contemplates the EEOC "enter[ing] into a conciliation agreement to which *the person aggrieved is a party*" (42 U.S.C. 2000e-5(f) (emphasis added)).

In contrast, the Title VI administrative process, as described above, is consciously directed not to the interests of the individual complainant, but more broadly concerned with the relationship of the federal agency to the recipient of federal financial assistance. The complainant is not even a formal "party" even when the agency holds a formal ad-

[9] As this Court has previously noted, the position of the federal government has been that private enforcement of Title IX (or Title VI) does not require prior exhaustion of administrative remedies. See *Cannon* v. *University of Chicago*, 441 U.S. at 687-688 n.8.

ministrative hearing, much less when the agency conducts "informal" negotiations and "voluntary" conciliation. The complainant may participate only when invited by the federal agency. Hence, while the federal administrative framework of compliance review and enforcement is an essential part of Title VI enforcement, it is not an "integral" component of *private* Title VI enforcement; Section 1988 applies only to the latter circumstance.

4. Finally, we note that an extension of the scope of attorney's fee awards to include informal agency negotiations, such as those that took place in this case, would be unprecedented. Even in the Equal Access to Justice Act, 5 U.S.C. 504, 28 U.S.C. 2412 (d)(3), where Congress expressly authorizes attorney's fee awards for time spent in administrative proceedings, the scope of the term "proceedings" is limited to *adversary* adjudications and does not embrace informal agency proceedings, such as the informal negotiations at issue in this case. Fee awards under the Equal Access to Justice Act are further limited to a "party" to the adjudicatory proceedings (*ibid.*), which, as described above, is a status respondents did not possess.[10]

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[10] The Equal Access to Justice Act defines "party," by reference to the Administrative Procedure Act, 5 U.S.C. 551(3), as "a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party * * * [or] admitted by an agency as a party for limited purposes." Respondents would not meet this definition. If every person who complained to a federal agency about a violation of Title VI automatically became a party to the federal compliance review and enforcement process, the administrative scheme would become so cumbersome as to be ineffective.

A recent Fifth Circuit decision, *Arriola* v. *Harville*, 781 F.2d 506 (1986), construing Section 14 of the Voting Rights Act of 1965, 42 U.S.C. 1973*l*, similarly cuts against respondents' claim for attorney's fees. Section 14 of the Voting Rights Act contains an attorney's fee provision virtually identical to Section 1988, authorizing fees to a prevailing party in "any action or proceeding to enforce the voting guarantees" of the Constitution (42 U.S.C. 1973*l*). In *Arriola*, the Fifth Circuit concluded that individuals who participate in the preclearance process under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, are not entitled to an award of fees, relying on the nonadversary nature of the preclearance process and the limited role of third parties in the process (781 F.2d at 510). The Fifth Circuit stressed several factors, including how (1) " 'action or proceeding' commonly refers to some sort of adversary proceeding in the nature of a traditional lawsuit" (*ibid.*); (2) "[t]he preclearance process was developed * * * to *avoid* a judicial decision" (*ibid.* (emphasis in original)); and (3) "interested individuals and groups have none of the rights of parties" (*ibid.*). These same factors are present in this case and equally support dismissal of respondents' Section 1988 claim.

Just as there are rules that govern who may be a party to a lawsuit (see Fed. R. Civ. P. 17-25), so too there must be a procedure for limiting the parties to the federal administrative process. That respondents participated in the agency's informal conciliation efforts did not, moreover, convert the federal administrative process into an alternative forum for the complainant to engage in an adversary "proceeding" with the federal-aid recipient, within the meaning of Section 1988.

B. Application Of Section 1988 To Title VI Administrative Proceedings Is Inconsistent With The Rationale Of The Decisions Of This Court Implying A Private Right Of Action To Enforce Title VI And Threatens To Disrupt Agency Enforcement Efforts

1. Denial of respondents' attorney's fees claim does not detract, moreover, from the important, yet distinct, role of private enforcement of Title VI endorsed by this Court. A majority of this Court, with the urging of the federal government, has adopted the view that there exists a "private right of action," implied by the judiciary, to enforce both Title VI and Title IX against the recipients of federal funds. See *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 419-420 & n.26 (1978) (opinion of Stevens, J.) citing U.S. Supp. Br. Amicus Curiae at 24-34 (*Bakke*); *Cannon* v. *University of Chicago*, 441 U.S. at 702 & n.33, 707-708 & nn. 41 & 42; see also *Guardians Ass'n* v. *Civil Service Comm'n*, 463 U.S. 582, 593-595 (1983) (opinion of White, J.). Respondents, however, seek to expand and alter the role of private enforcement of Title VI in a manner that ignores the rationale of those earlier decisions and that threatens to interfere with federal enforcement efforts.

In particular, this Court allowed private rights of action under Title VI in part to avoid "the disrupti[on] of [agency's] efforts efficiently to allocate its enforcement resources" that a suit to compel either agency investigation or termination of agency funding would create (*Cannon*, 441 U.S. at 707 n.41). The Court was also motivated by its understanding of the nature of administrative agency enforcement, which was not, by congressional design, intended to protect the interests of the individual complainant (*ibid.*; see also *Adams* v. *Bell*, 711 F.2d 161, 167

(D.C. Cir. 1983) ("[t]he primary mechanism [for private enforcement] is a Title VI suit against the [recipient] itself"), cert. denied, 465 U.S. 1021 (1984)). The Court discounted the potential for interference between the express congressional federal agency enforcement scheme and private rights of action, implied by the judiciary, on the ground, suggested by us, "that if the possibility of interference arises in another case, appropriate action can be taken by the relevant court at that time" (441 U.S. at 706 n.41).

The practical effect of respondents' expansive reading of private enforcement of Title VI, however, would be to convert the federal agency enforcement mechanism into an avenue for private enforcement, ignoring the original impetus for implying private rights of action and also interfering with the express congressional agency enforcement scheme.[11] While the potential for such interference always offers a reason for limiting a judicially implied private right of action, the need is especially great in a case, such as this one, which arises in the context of congressional exercise of its power under the Spending Clause. "This is because the receipt of federal funds under typical Spending Clause legislation [such as Title VI] is a consensual matter: the State or other grantee weighs the benefits and burdens before accepting the funds and agreeing to comply with the conditions attached to their receipt" (*Guardians Ass'n* v. *Civil Service Comm'n*, 463 U.S. at 596 (opinion of

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[11] See *University of California* v. *Bakke*, 438 U.S. at 419 n.26 (opinion of Stevens, J.) ("Arguably, private enforcement of th[e] 'elaborate mechanism' [for federal agency enforcement] would not fit within the congressional scheme.") (citations omitted).

White, J.); cf. *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 17-18 (1981)). No doubt for this reason, in Title VI, Congress instructed the federal agencies to rely in the first instance on informal conciliation efforts and voluntary means of compliance to resolve Title VI violations. Respondents' view of the role of private enforcement, including application of Section 1988 to their participation in informal agency-sponsored negotiations, takes no account of these significant congressional concerns and would unduly expand the role of private enforcement of Title VI in a manner that threatens the preeminent federal enforcement role.[12]

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[12] There is also no clear authorization for a lawsuit, such as respondents', filed for the *sole* purpose of recovering attorney's fees under Section 1988. The plain words of Section 1988 do not appear to contemplate such a filing; the statute merely provides a court with discretion to award the prevailing party attorney's fees "[i]n any action or proceeding to enforce * * * Title VI" (42 U.S.C. 1988). Respondents, however, have not filed this action "to enforce * * * Title VI" and, consequently, do not appear to fall within the terms of the statute. To be sure, this Court has (in dicta) previously intimated in the context of reviewing the attorney's fee provision applicable to Title VII (42 U.S.C. 2000e-5(k)) that "[i]t would be anomalous to award fees to the complainant who is unsuccessful or only partially successful in obtaining [administrative] remedies, but to deny an award to the complainant who is successful in fulfilling Congress' plan that federal policies be vindicated at the [administrative] level" (*Carey*, 447 U.S. at 66; but see *id.* at 70-71 (Stevens, J., concurring)). These concerns, however, are not so weighty in the Title VI context where the administrative enforcement framework is not (as discussed previously) an indispensable element of private enforcement. Title VII, moreover, expressly authorizes a civil suit in federal court (see 42 U.S.C. 2000e-5(f)(1)), while private enforcement of Title VI depends on a right of action implied by the judiciary; consequently, maintenance of respondents' lawsuit depends on a further expansion of the scope of private rights of action under Title VI.

In this case, for example, there were never any formal agency administrative proceedings. Instead, USDOT initiated informal negotiations with petitioners, respondents, and other groups interested in the highway project, as part of the agency's efforts to promote voluntary means of compliance. It is hardly consistent with the informal or voluntary nature of those negotiations to suggest that participation of complainants, such as respondents, triggers the attorney's fee provision of Section 1988. Indeed, application of Section 1988 would likely stifle meaningful informal settlement discussions, contrary to Congress' explicit wishes in Title VI. Rather than working freely with others to reach a consensus position, complainants who have a potential ability to recover attorney's fees may be more likely to adopt an adversary posture consistent with the expectation that they would ultimately be reimbursed for their expenses. For this reason, the prospect that fees could be recovered against the recipient might lead to a refusal to allow the complainant to participate in the negotiations (leaving the federal agency and the recipient to work out the agreement).[13]

2. Finally, respondents may argue that our theory of the relationship between private and federal agency enforcement would have the effect of scuttling effec-

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[13] Alternatively, should complainants continue to participate, application of Section 1988 could change the ultimate terms of the agreement; the recipient, knowing that it faces the prospect of attorney's fees, could simply be less willing to agree to incur expenses associated with the merits of the dispute.

tive informal negotiations by promoting the premature filing of lawsuits by parties who wish to be in a position to recover their attorney's fees. See H.R. Rep. 94-1558, 94th Cong., 2d Sess. 7 (1976) ("A 'prevailing party' should not be penalized for seeking an out-of-court settlement, thus helping to lessen [court] congestion."). "We cannot assume[, however,] that an attorney would advise the client to forego an available avenue of relief solely because § 1988 does not provide for attorney's fees for work performed in the * * * administrative forum" (*Webb*, slip op. 7 n.15). But, in all events, any such argument would underestimate the full import of our view of the proper relationship between private enforcement of Title VI and the federal administrative framework for compliance review and enforcement under Title VI.

Simply put, a complainant may not be required to exhaust the federal administrative proceedings, but the absence of an exhaustion requirement does not place private judicial enforcement on an equal (let alone higher) footing than federal agency enforcement. Rather, exhaustion is unnecessary only because the administrative remedy, while central to Title VI enforcement, was not intended to be an avenue of private relief, not because private judicial enforcement can ignore the administrative enforcement framework expressly created by Congress. Private enforcement, which is permitted by inference from the statutory scheme, should always be tempered by the needs of the explicit statutory requirements of federal agency administrative enforcement and compliance review. Hence, if requested by the federal government, a court should normally stay a private Title VI enforcement action pending completion of

federal administrative efforts, including investigation, conciliation efforts, and remedial determinations, in order to avoid any potential interference between private enforcement and the federal agency's own enforcement efforts. See *Cannon*, 441 U.S. at 687 n.8.[14] A preemptive filing of a lawsuit by a complainant consequently would not necessarily entitle the complainant to an award of attorney's fees in the event (as in this case) that the federal agency efforts led to a favorable resolution. The availability of a private right of action to sue a recipient in court does not mean that a private complainant is completely free to seek judicial relief without any regard to the federal agency's right, in the first instance, to make reasonable efforts to resolve the controversy either on its own or, should the agency prefer, with the assistance of both the complainant and the recipient. To be sure, under our view, private enforcement might occasionally be stayed pending federal agency enforcement efforts, but we believe that result is consistent with the statutory scheme envisioned by Congress when enacting Title VI.[15]

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[14] Of course, the converse is equally true. The federal agency is not generally obliged to act first and may simply defer to the private enforcement proceeding.

[15] Of course, hypothetical circumstances may exist where a private individual might be able to maintain a legitimate claim for attorney's fees for time spent in administrative proceedings under the theory that time spent in those proceedings was "reasonably expended *on the litigation* * * *" (*Webb*, slip op. 8 (emphasis in original), quoting *Hensley* v. *Eckerhart*, 461 U.S. 424, 433 (1983)). This would require at least a showing that a "discrete portion of the work product from the administrative proceedings was work that was useful and of a type ordinarily necessary to advance the * * * litigation" (*Webb*, slip op. 9). Here, of course, there was no litigation

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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and, accordingly, such an alternative showing is not available to respondents. Respondents' effort to intervene in a pending (non-Title VI) lawsuit, never acted on by the district court, was incidental to the settlement agreement and does not supply the necessary threshold "litigation." As the district court found (Pet. App. 39), "there is no evidence that the * * * effort[] * * * significantly contributed to the execution of * * * [or] was even a catalyst to the [Final Mitigation] Plan."

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